

THE CONCEITS OF OUR LEGAL IMAGINATION: LEGAL FICTIONS AND THE CONCEPT OF DEEMED AUTHORSHIP

*Alina Ng Boyte**

Legal fictions contain embedded nuggets of information about social reality and reveal important aspects of human society. However, the use of legal fictions may also obscure important information or fundamental questions about law and its role in shaping society. These fictions become institutionalized without a clear understanding of their function. When that happens, fallacious assumptions about human behavior and social relationships transform into binding principles that set the course for future legal development, potentially resulting in legal rules that are completely dissociated from social, historical, or cultural reality. This article explores the concept of deemed authorship as a legal fiction in copyright law and describes how this fiction both obscures fundamental notions about authorship and creativity and complicates copyright jurisprudence, preventing our consideration of the proper legal questions about creativity and its impact on the progress of science. This article argues that the institutionalization of this legal fiction separates an author from the defining attributes of personhood and contradicts our basic understanding about human creativity. As the fiction of deemed authorship inaccurately depicts the role of creators, it isolates rather than socializes legal language. Since this and other fictions that contradict our experiences of reality may cause more harm than benefit to our understanding of the law, they must be used with caution so that legal rules that are more consistent with institutional aspirations, individual and communal expectations, and the rule of law can develop.

| | |
|---|-----|
| INTRODUCTION | 708 |
| I. LEGAL FICTIONS: THE GOOD, THE BAD, AND THE UGLY | 712 |
| A. How Legal Fictions Work | 712 |
| B. Fictions in Human Thought | 721 |
| C. Troublesome Fictions | 726 |

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| | |
|---|-----|
| II. ANALYTICAL DIFFICULTIES IN THE CONCEPT OF | |
| DEEMED AUTHORSHIP..... | 735 |
| A. The Mystification of the Author | 747 |
| B. The Alienation of Authorship | 754 |
| C. The Diminishment of Copyright's <i>Sine Qua Non</i> .. | 757 |
| CONCLUSION..... | 760 |

INTRODUCTION

Legal fictions propagate so many untruths in the practice of law that Jeremy Bentham once quipped that in English law, a “fiction is a syphilis, which runs in every vein, and carries into every part of the system, the principle of rotteness.”¹ Fraudulent as they may be, “these conceits of the legal imagination”² are actually important nuggets of information about our society embedded in the law. Saying that legal fictions contain information about social reality may sound oxymoronic, but this description is not as contradictory as one may initially think. These metaphors used by courts or the legislature to attain justice,³ set bright line rules,⁴ or establish normative standards⁵ also reveal distinct characteristics about the society in which we live. The glaring contrast between a fact and its corresponding legal fiction should be incisive in showing that legal rules are often limited in their capacity to address the realities of human interaction. Legal fictions prove indispensable in connecting the law’s familiar experiences and its conventional knowledge with these unanticipated human events to attain an outcome that is most congruent with what society understands its legal system to be.

Yet, casual uses of fictions may defeat their very reasons for existence. When used without a clear understanding of their purpose, legal fictions can transform metaphors about social behavior and

1. JEREMY BENTHAM, *THE ELEMENTS OF PACKING: AS APPLIED TO SPECIAL JURIES, PARTICULARLY IN CASES OF LIBEL LAW* 62 (1821).

2. LON L. FULLER, *LEGAL FICTIONS* 1 (1967).

3. *See, e.g.*, *Porter v. Earthman*, 12 Tenn. 358, 367 (1833) (Opinion of Catron, C.J.) (stating that the legal fiction that judgments in favor of different lien holders were all made on the first date of the term in which the judgment was rendered irrespective of when the judgment was actually rendered “was adopted to attain the ends of justice.”).

4. For example, a child is treated as an adult when he reaches the age of majority; this is a legal fiction that creates a bright line rule because in reality, “children do not magically become adults when they turn eighteen.” *See* Seema K. Shah & Franklin G. Miller, *Can We Handle the Truth? Legal Fictions in the Determination of Death*, 36 *AM. J.L. & MED.* 540, 560 (2010).

5. Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 *TEX. INT’L L.J.* 763, 768 n.30 (2003).

human truths into binding legal principles that set the trajectory of legal development in stone—all inconspicuously and without our realization.⁶ This becomes especially troubling since fundamental questions about human ontology can never come to light when they remain shrouded by a cloak of falsity. We may miss seeing truly important questions due to our single-minded concentration on a practical—but untrue—fiction. Law can be powerfully conceptualized as a type of human language, clearly communicating the desires of legal institutions to members of their society.⁷ Legal fictions play the important role of providing analogies, metaphors, and categories to help us find meaning in—and hopefully understand—the language of the law.⁸ We should thus be vigilant in the use of legal fictions in order to avoid thinking that they convey truths about society or individuals.

This article explores the legal fiction of deemed authorship, a legal doctrine that bestows copyright protections on an entity other than the work's true creator. Contemporary copyright jurisprudence treats deemed authorship as an institutionalized norm.⁹ Unless we remember why this fiction is used, it is impossible to address some of the more fundamental questions about human creativity and the act of authorship. This article argues that the institutionalization of this legal fiction alienates the work's creator from the defining attributes of authorship and personhood. As a result, it contradicts our basic understanding of authors and their creative processes. The fiction of deemed authorship is so well integrated into copyright law that its primary purpose as support for legal reasoning has faded into the backdrop of the law's tapestry. It is now taken as representing certain truths about our society despite its inaccurate representation of human authors and their creative undertakings. This particular conceit of our legal imagination has obscured—not revealed—the truth about human authorship.

6. See Note, *Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law*, 115 HARV. L. REV. 2228, 2232–33 (2002).

7. John R. Searle, *What is language: some preliminary remarks*, in JOHN SEARLE'S PHILOSOPHY OF LANGUAGE: FORCE, MEANING AND MIND 15, 43 (Savas L. Tsohatzidis ed., 2007) (describing human language to represent and create "a deontology of rights, duties, commitments [that] can be extended to create a social and institutional reality").

8. See BENJAMIN K. BERGEN, *LOUDER THAN WORDS: THE NEW SCIENCE OF HOW THE MIND MAKES MEANING* 3–5 (2012).

9. See, e.g., *Rodrigue v. Rodrigue*, 55 F. Supp. 2d 534, 543 (E.D. La. 1999) (describing a work-made-for-hire situation, wherein an employer is deemed the author of the employee's work, and where the law treats the issue as "one of authorship and not of transfer of rights; the employer is presumed to be the author initially and not by virtue of a post-creation transfer.").

In Part I of this paper, I discuss the role of legal fictions. Specifically, I describe the function of legal fictions in attaining justice, creating certainty, and establishing standards in the law, recognizing that these are important functions in facilitating legal thought about difficult and untried social issues. The use of fictions in the law—as in many other disciplines¹⁰—helps develop our limited understanding of the world and clearly lays out the reason for particular legal rules, engendering social respect for clear, sound laws.¹¹ When the law is well constructed, a more productive society is created. Instead of socializing legal language, however, some legal fictions dissociate the law from social and moral norms because they institutionalize false ideas that lead to incorrect—and sometimes immoral—legal conclusions. When these legal fictions are used without a clear understanding that they are false and are meant to facilitate legal thought, they prevent us from seeing more important issues, pursuing answers to difficult questions, and developing a fuller understanding of the law because of their illustrious and beneficent facade.

Part II turns to the concept of deemed authorship. It classifies this concept as a troublesome fiction that blurs the distinction between the reality of human creativity and the falsity of imputed authorship. The work-for-hire doctrine in copyright is the quintessential embodiment of deemed authorship *and* it allocates initial authorship and ownership of a work with the employer or other person for whom the work was prepared.¹² This doctrine is troublesome because it imputes authorship on an entity other than the actual creator of the work and divests the actual creator of his identity as the true author—an identity essential

10. See HANS VAHINGER, *THE PHILOSOPHY OF 'AS IF': A SYSTEM OF THE THEORETICAL, PRACTICAL AND RELIGIOUS FICTIONS OF MANKIND* 3 (C.K. Ogden trans., 6th ed. 1924).

11. A basic objective in legal philosophy is the study of law and legal systems and the authority of human language to demand individual obedience to particular codes of conduct. For natural lawyers, human laws expressed in human language are capable of demanding obedience because they are manifestations of divine will. More secularized theories of law, such as analytical jurisprudence, theorize that human language commands obedience and creates order because certain social conditions exist to support the law's authority. See Randall E. Auxier, Order, in 2 *THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 619, 620 (Christopher Gray ed., 2000). Unless the will of the lawmaker is communicated in language that makes sense to those it binds and becomes, in that respect, socialized, laws cannot have binding authority because they cannot be understood by their subjects.

12. The Copyright Act provides that “[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the *author* for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. § 201(b) (2012) (emphasis added).

to personhood.¹³ Divesting the true creator of his identity as the author and imputing that identity to someone else as if that identity were alienable violates human dignity and the creator's ability to flourish.¹⁴ However, this point may be obscured by the efficiency of the work-for-hire doctrine as a legal rule in the copyright system.¹⁵ Though

13. See MARGARET J. RADIN, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982). The idea of personhood in Professor Radin's work is encapsulated as a moral ideal that an individual can only achieve proper self-development and become a complete person when he is able to control resources in his external environment. Some of these external resources are personal and inextricably bound to the individual for whom its loss would cause pain. Radin argues that the law should provide greater protection to property claims over such resources where they are personal to the individual and constitute part of his personhood. In this light, creative expressions may also be subject to property rights by virtue of their creation, but the author's identity as the true author of the work—while not the subject of property—is even more personal to the author than the work itself, and thus, the author's identity should be protected by a rule against divestment. Since authorship draws so much from the author's identity—which we may think of as his “history and future” and “life and growth” that he poured into the work—the law should protect a creator's identity as the true author with a strict property-type rule. *Id.* at 992.

14. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1879–81 (1987). Professor Radin developed a theory of market inalienability and argued that some market discourses are harmful to personhood. Personal attributes such as bodily integrity are not fungible objects that can “pass in and out of the person's possession without effect on the person.” *Id.* at 1880. (Such attributes cannot be commodified and alienated because they are essential to the ideal of personhood). I argue in this paper that authorship is an attribute personal to the author. As author, identity as creator connotes that a person invested labor, imagination, personality, and individual experience to create an authentic work, this identity is essential to how one perceives himself as a person.

15. The work-for-hire doctrine served an important role when it emerged in copyright jurisprudence. It helped courts reconcile individual creativity with the rise of corporate America and the inevitable pressure to allocate initial ownership of the work in a corporate employer as a matter of economic exigency. See Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 260 (2008) (justifying corporate ownership of the intellectual labor of employees in the second half of the nineteenth century as “part of a general move in the period's legal thinking—a move to adjust traditional legal doctrines and categories to the new environment of corporate liberalism.”); R.H. COASE, *The Nature of the Firm*, in THE FIRM, THE MARKET, AND THE LAW 33, 38–40 (1988). In his theory of the firm, Ronald Coase pointed out that firms exist mainly because it is sometimes costly to depend on prices to coordinate market activity. One of the costs of using prices to negotiate transfer of resources is the cost of negotiating and entering numerous individualized contracts along one production line. When one works with a firm, this is no longer necessary; one only enters in to a single contract with the firm, “[f]or this series of contracts is a substituted one.” *Id.* at 39. The work-for-hire doctrine allowed authorial rights stemming from multiple creators in the production of a work, such as a cinematographic work, to be consolidated in the employer of these individual talents such as a movie studio. See *United States Copyright Office and Sound Recordings as Work Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. 134 (2000) (prepared statement of Paul Goldstein, Professor, Stanford Law School).

deemed authorship may be a necessary and expedient legal fiction, its use should not obscure more fundamental questions about the author, the notion of authorship, and the goal of scientific progress through copyright. We should not forget that these pressing questions exist simply because a legal fiction hints that they do not.

I.

LEGAL FICTIONS: THE GOOD, THE BAD, AND THE UGLY

A. *How Legal Fictions Work*

Fictions abound throughout the law. When successful, these fictions typically serve one of three purposes: to promote fairness, increase efficiency, or provide a standard against which litigants' behavior may be evaluated.

Common-law courts have traditionally used legal fictions to serve justice when the strict application of the law produced unfair results.¹⁶ For instance, consider the case of Mrs. Evans, a 79-year-old widow at the heart of the seminal British case *Binions v. Evans*.¹⁷ When her husband died, the property owners for whom he worked promised Mrs. Evans (whose first name was not reported) that she would be able to live on the same property that her husband—and several generations before him—had lived and worked on until death. But the Evans did not own the property—they lived on it as caretakers in a cottage provided at the will of their employers, the owners of the Estate. The Estate had promised Mr. Evans that he could live in the cottage for as long as he worked there and, furthermore, that Mrs. Evans could remain after he died. Shortly after Mr. Evans passed, the property was purchased by Mr. and Mrs. Binions, who, despite buying the property with actual knowledge of the Estate's promise to Mrs. Evans, unexpectedly served notice on Mrs. Evans to leave the property even as she was tending to it after her husband's death. Since Mrs. Evans had a mere promise (in the form of a contractual license instead of a property right such as a lease) to occupy the property,

16. *Parker v. Ellis*, 362 U.S. 574, 596 (1960) (“fictions were often expedients to further the end of justice.”). Sir William Blackstone, writing in his *Commentaries*, saw the “proper operation” of legal fictions as “being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law.” WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS* *43. See also Sidney T. Miller, *The Reasons for Some Legal Fictions*, 8 MICH. L. REV. 623, 623 (1910) (defining a legal fiction as a “legal assumption that something is true, which is, or may be, false—being an assumption of an innocent and beneficial character, made to advance the interests of justice.”).

17. *Binions v. Evans*, [1972] Ch. 359 (Wales).

precedent indicated she should vacate the property upon the request of its new owners.¹⁸

Under traditional legal principles, Mrs. Evans, as a mere licensee, would have had to vacate the property once she was asked to leave. Yet the Court of Appeal decided for Mrs. Evans because Mr. and Mrs. Binions' purchase contract expressly subjected them to Mrs. Evans' occupancy and, thus, they bought the property with actual knowledge of the Estate's promise to Mrs. Evans. Mr. and Mrs. Binions even paid less for the property than they otherwise would have if they had bought the property without Mrs. Evans' license.¹⁹ To reach what it saw as an equitable outcome for Mrs. Evans, the court here used the fiction of the constructive trust to make the new property owners constructive trustees of Mrs. Evans' beneficial interest.

The court's reliance on the fiction of constructive trust in *Binions v. Evans* served a moral purpose and furthered the interest of justice. As a constructive trust can be imposed *in invitum* or against the will of the parties, it is an exception to the traditional rule that trusts of real property must be created in writing or otherwise represent the parties' presumed intention.²⁰ In both express and resulting trusts, a fiduciary relationship may be established from the real or presumed intention of the parties to create a trust. The trust acknowledged by the courts in both cases of express and resulting trusts is overtly or impliedly created by the parties.²¹ Constructive trusts, on the other hand, are not the product of the parties' intention; rather, they are fictional artifacts used by the courts to achieve an equitable result. As Lord Denning M.R. stated in *Binion v. Evans*, the constructive trust was imposed simply

18. See *King v. David Allen & Sons Billposting Ltd.*, [1916] 2 A.C. 54 (H.L.), 61 (appeal taken from Ir.) (“[The] contract between the appellant and the respondents . . . creates nothing but a personal obligation. It is a license given for good and valuable consideration and to endure for a certain time. But . . . there is [no] authority for saying that any such document creates rights. . . . [Arising from a] relationship of landlord and tenant or grantor and grantee . . . it [cannot] be reasonably urged that anything beyond personal rights was ever contemplated by the parties.”); see also *Binions*, [1972] Ch. at 367 (stating that Mrs. Evans had “a license, and no tenancy. It is a privilege which is personal to her. . . . [The promise to Mrs. Evans] ranks as a contractual [license] and not a tenancy.”).

19. *Binions*, [1972] Ch. at 365.

20. George P. Costigan, Jr., *The Classification of Trusts as Express, Resulting, and Constructive*, 27 HARV. L. REV. 437, 446–47 (1914) (exemplifying the principle that trusts may not be in writing but “result” from the circumstances of a case and presumed intention of the parties, such as when the incomplete transfer of a beneficial interest produces part of an estate that has no takers and a reversionary interest is implied back to the grantor).

21. *Id.* at 448 (“Express trusts and resulting trusts are trusts by the real or the presumed intention of the parties. . . .”).

because it was inequitable for Mr. and Mrs. Evans to turn Mrs. Evans out:

Suppose, however, that the defendant did not have an equitable interest at the outset, nevertheless it is quite plain that she obtained one afterwards when the Tredegar Estate sold the cottage. They stipulated with the plaintiffs that they were to take the house "subject to" the defendant's rights under the agreement. They supplied the plaintiffs with a copy of the contract: and the plaintiffs paid less because of her right to stay there. In these circumstances, this court will impose on the plaintiffs a constructive trust for her benefit: for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises . . . *This imposing of a constructive trust is entirely in accord with the precepts of equity.*²²

Lord Denning's broad application of the constructive trust to situations where one party acts inequitably to harm another has not been widely adopted in English law.²³ However, the fiction of the constructive trust has been widely adopted in the United States to provide remedies when one party benefits unfairly at the expense of another. The constructive trust is not only used by U.S. courts as a shield to protect innocent parties,²⁴ but is also commonly used as a sword in restitution claims against a party who has unjustly profited through wrongdoing.²⁵ The constructive trust is thus a "device used by equity to compel one who unfairly holds a property interest to convey the same to another to whom it justly belongs."²⁶ While constructive trusts function to prevent actions by legal title holders of property that deprive its true

22. *Binions*, [1972] Ch. at 368 (emphasis added).

23. SARAH WILSON, TODD AND WILSON'S TEXTBOOK ON TRUST 261 (2007).

24. *See, e.g.*, *Dominick v. Rhodes*, 24 S.E.2d 168, 172-73 (1943) (the court imposed a constructive trust on a father who took his son's property and treated the property as his own, stating that an express or conventional trust relationship between the parties was not necessary for the courts to impose a constructive trust if "the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title, as against another, provided some confidential relation exists between the two, and provided the raising of a trust is necessary to prevent a failure of justice"; the court went on to state that "the forms and varieties of constructive trusts are practically without limit, such trusts being raised, broadly speaking, whenever necessary to prevent injustice.") (emphasis removed from original).

25. *American Family Care, Inc. v. Irwin*, 571 So. 2d 1053, 1058-59 (Ala. 1990) ("A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.") (quoting *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919)).

26. *Schaffer v. Schaffer*, 183 N.Y.S.2d 882, 882 (Sup. Ct. 1959).

beneficiaries of their expected gains, they also allow courts to achieve fairer decisions in specific cases where the desired outcome is irreconcilable with the applicable legal rule. The constructive trust bridges aspired legal outcomes, such as just results, with a more fundamental goal in law—that free, willing, and able parties to a given transaction conduct themselves in good faith.²⁷

Legal fictions are not only used to achieve justice when legal rules are harsh. At times, they have also been used to simplify laws and create bright-line rules to ease their application. For instance, a number of legal fictions have been created to ease application of the Rule Against Perpetuities. The Rule Against Perpetuities invalidates contingent future interests in wills and estates that are too remote, such as when a testator grants property to a person with conditions that can only be satisfied after the defined perpetuities period.²⁸ This rule ensures the free alienability of property. It was historically adopted to support the development of a mercantile middle class by ensuring that property entered “the stream of commerce” and did not stay within the landowner’s control.²⁹ But even if the historical rationale for the rule has become obsolete, other contemporary rationales for the rule exist, such as to strike a fair balance between property rights of present and future generations, advance the socially desirable policy that property be freely circulating among the living, and limit the control of property by those who have died.³⁰

A variety of legal fictions—some bordering on absurdity—were adopted to support the Rule Against Perpetuities and void gifts of

27. See, e.g., *Cenac v. Murry*, 609 So. 2d 1257, 1272 (Miss. 1992) (“All contracts contain an implied covenant of good faith and fair dealing in performance and enforcement.”); *Wilson v. Amereda Hess Corp.*, 773 A.2d 1121, 1126 (N.J. 2001) (“A covenant of good faith and fair dealing is implied in every contract in New Jersey.”); *Seidenberg v. Summit Bank*, 791 A.2d 1068, 1077 (N.J. Super. Ct. App. Div. 2002) (“The guiding principle in the application of the implied covenant of good faith and fair dealing emanates from the fundamental notion that a party to a contract may not unreasonably frustrate its purpose.”). See also RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).

28. The classical articulation of the Rule Against Perpetuities is provided by Professor John Chipman Gray: “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.” JOHN CHIPMAN GRAY, *RULE AGAINST PERPETUITIES* § 201 (ROLAND GRAY ED., 4TH ED. 1942), quoted in THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 573 (2nd. ed. 2012).

29. Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 708 (1955).

30. *Id.* at 709–10. See also George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 20 (1977).

property vesting too remotely. These fictions supported the general legal and economic notion that property would only be valuable when it was in free and active circulation.³¹ Legal fictions of the “fertile octogenarian,” the “unborn widow,” and the “precocious toddlers” serve to invalidate gifts that could potentially vest in individuals at least 21 years after the death of any person alive when the interest was created. These fictions allowed courts to presume that the fertile octogenarian or precocious toddler could have a child eligible to take the gift after the perpetuities period.³² Although these fictions may be preposterous—especially in light of medical and physiological realities of the time³³—their bright-line assumptions provided legal certainty by eliminating the need for medical testimony on a person’s ability to father or bear a child.³⁴ The conclusive presumption that a person may have a child throughout his or her lifetime frees the law from depending on professional claims to make determinations about the validity of posthumous gifts. Professional mistakes sometimes happen,³⁵ and adducing medical evidence of infertility, as Professor Leach pointed out, may be difficult.³⁶

31. See *Maiben v. Bobe*, 6 Fla. 381, 398 (1855).

32. Under the Rule Against Perpetuities, all future interest (particularly contingent remainders and executory interests) must vest within twenty-one years after the death of a life-in-being living at the time the interest is created. The rule works on the assumption that a person is fertile from the time of birth right until death. Hence an interest will fail if there is the possibility that a two-year old boy or an eighty-year-old woman might bear a child after the perpetuities period. An interest would also fail if it is given to someone who might marry a woman yet to be born at the creation of the interest. For a discussion of the fertile octogenarian and the unborn widow, see W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 643–44 (1938). Professor Leach envisions a case involving a “precocious toddler” inadvertently arising by a drafting mistake since the presumption of fertility regardless of age and physical condition appears to be firmly established in the law. For this discussion, see W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721, 731–32 (1952).

33. It should be noted that the possibility of a toddler or an octogenarian having a child is no longer a hypothetical in this age. In fact, science and medicine have advanced to a point where these theoretical possibilities have become factually plausible. See Sharona Hoffman & Andrew P. Moriss, *Birth after Death: Perpetuities and the New Reproductive Technologies*, 38 GA. L. REV. 575, 592 (2004) (describing scenarios where pregnancies, or reproductions, could occur among infants and octogenarians through new reproductive technologies); see also DUKEMINIER, ET AL. 247 n.22 (2014) (discussing a woman who gave birth to twins at 67 years of age and a young girl who gave birth to a baby boy at the age of 5).

34. W. Barton Leach, *Perpetuities: New Hampshire Defertilizes the Octogenarians*, 77 HARV. L. REV. 279, 281–83 (1963).

35. *Id.* at 281–82.

36. *Id.* at 282–83.

Such conclusive presumptions, while fictional, are efficient and achieve certainty in the law. To take another example, the fiction of corporate personhood creates a legal entity with its own powers and rights as well as duties and liabilities. It allows the corporation to exist independently of its shareholders and directors as a separate legal person.³⁷ The formation of the modern corporation allowed shareholder ownership of the corporation's business to be separated from executive management of the corporation's affairs, and allowed corporate resources to be used more efficiently.³⁸ Moreover, a single corporation that vertically integrated its production and marketing functions would be able to reduce business expenses through the internalization of previously external market transactions.³⁹ The fiction of corporate personhood provides a number of advantages to achieve an efficient market. It supports the integration of corporate functions while separating members of the corporation from the corporation's legal identity.

In addition to promoting fairness and efficiency, legal fictions also set normative standards against which social activity can be evaluated. For instance, the hypothetical "reasonable man" in tort and criminal law is used to establish standards for reasonable conduct that individuals are expected to meet. The normative standard established by the care the hypothetical reasonable man is expected to take would be a standard of "ordinary care," which "the great mass of mankind would ordinarily exercise" under similar circumstances.⁴⁰ In patent law, the "person skilled in the art" establishes the baseline for inventiveness before an invention will be considered sufficiently inventive to justify the grant of a monopoly over the invention for twenty years.⁴¹ The "person skilled in the art," like other hypothetical individ-

37. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 667–68 (1819) (a corporation is "an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage. Hence, such a corporation may sue and be sued by its own members; and may contract with them in the same manner as with any strangers.").

38. Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *GEO. L.J.* 1593, 1681–82 (1988).

39. See Coase, *supra* note 15, at 37–40.

40. *Osborne v. Montgomery*, 234 N.W. 372, 375–76 (Wis. 1931).

41. 35 U.S.C. § 103 (2013) ("A patent for a claimed invention may not be obtained . . . if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains."). See also 35 U.S.C. § 154(a)(2) (setting the patent term as twenty years from the date on which the patent was filed).

uals used to establish acceptable standards of conduct, requires the court to revert to the point the invention was made and determine whether the hypothetical person would have seen the invention as obvious.⁴² The fictional attributes of the person skilled in the art, however, make it difficult to accurately determine his cognitive abilities,⁴³ and scholars more generally have criticized the reasonable person standard as being susceptible to circular reasoning.⁴⁴ Despite these shortcomings, the fiction of the hypothetical reasonable man remains a useful normative measure that allows courts to reconcile the conflicting social interests of a legal actor with those of the society as a whole.⁴⁵

Legal scholars have generally been ambivalent and indecisive about the value of legal fictions. The few scholars who have written about fictions in the law have reached opposing conclusions about legal fictions and their virtue. The more visceral criticism against legal fictions have been advanced based on a committed belief to the principle of legislative supremacy—the principle that the ultimate law-making authority lies with the legislature instead of the judicial or executive branches.⁴⁶ To Jeremy Bentham, legal fictions allow the judiciary to surreptitiously usurp legislative authority and are objectionable because of their subservience to the judiciary’s “sinister interest” in seizing legislative authority.⁴⁷ As “removable creatures” of the monarchy, Bentham thought that the judiciary would systematically carry out the monarchy’s desire for “depredation and oppression” in an indirect and inconspicuous way through the pretenses of legal fictions.⁴⁸

Roscoe Pound furthered the view that legal fictions can be used by judges to legislate “under guise of interpretation.”⁴⁹ According to Pound, legal fictions are used to advance “[s]purious interpretation” that is intended “to make, unmake, or remake, and not merely to discover” legislative intent.⁵⁰ Though useful in the formative period of

42. *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1566 (Fed. Cir. 1987).

43. See Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 *YALE L.J.* 1590, 1604 (2011).

44. See *id.* at 1605–06.

45. PETER M. GERHART, *TORT AND SOCIAL MORALITY* 25 (2010).

46. T.R.S. ALLAN, *THE SOVEREIGNTY OF LAW: FREEDOM, CONSTITUTION AND COMMON LAW* 168 (2013).

47. JEREMY BENTHAM, *A FRAGMENT ON GOVERNMENT* (1776), reprinted in *COLLECTED WORKS OF JEREMY BENTHAM* 502, 503 (J. H. Burns, H.L.A. Hart & Phillip Schofield eds., 2008).

48. *Id.* at 510.

49. Roscoe Pound, *Spurious Interpretation*, 7 *COLUM. L. REV.* 379, 381 (1907).

50. *Id.* at 382.

the common law, Pound felt that spurious interpretation is an “anachronism in an age of legislation.”⁵¹ More recently, Professor Peter J. Smith argued that “even in the age of positive law,” judges “fashion new legal rules.”⁵² Instead of using factual assertions that are obviously false as with classical legal fictions, judges today offer an “ostensibly factual supposition as a ground for creating a legal rule or modifying, or refusing to modify, an existing legal rule.”⁵³ This factual supposition is descriptively inaccurate and works as a new legal fiction to support “the court’s normative choice among competing possible legal rules.”⁵⁴ Although Smith does not have the same distaste for judicial law-making as did Bentham and Pound, he asks for more judicial transparency as courts make normative choices.

Other scholars—such as John Austin, John Chipman Gray, and Lon Fuller—have been much less critical of legal fictions. These scholars did not see judicial use of legal fictions as an attempt by courts to deceive the public and usurp legislative authority. Instead, they viewed legal fictions as tools of legal reasoning that helped the courts reach more consistent legal decisions. John Austin, a disciple of Bentham,⁵⁵ believed that legal fictions are not as dangerous as his teacher described. Rather, Austin considered the theory that legal fictions are deceptive to be “ridiculous”⁵⁶ and thought it unlikely that “the authors of such innovations had the purpose of introducing them covertly.”⁵⁷ Instead, he saw fictions as innocent means by which judges and lawyers preserved ancient rules in modern society.⁵⁸

John Chipman Gray, though critical of fictions that add “new law to old without changing the form of the old law,”⁵⁹ was more receptive to fictions that “arrange recognized and established doctrines under the most convenient forms.”⁶⁰ Quoting Sir Henry Maine from his book, *Ancient Law*, Gray stated that historical fictions are “scaf-

51. *Id.* at 383.

52. Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1437 (2006).

53. *Id.* at 1441.

54. *Id.*

55. W.L. MORISON, JOHN AUSTIN 1 (1982).

56. JOHN AUSTIN, LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW 308 (Robert Campbell, ed., Jersey City, Henry Holt & Co., student’s ed. 1875)

57. *Id.*

58. *Id.*

59. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 30 (1921). These fictions were termed “historical fictions.” Gray relied on Ihering’s classification of legal fictions into historical and dogmatic fictions in his writing and used Ihering’s (also known as Jhering) classification to object to prolonged use of the historical fiction and welcome use of the dogmatic fiction. *See id.* at 30–37.

60. *Id.* at 36. These fictions were termed “dogmatic fictions” according to Ihering’s classification. *Id.*

folding—useful, almost necessary, in construction—but, after the building is erected, serving only to obscure it.”⁶¹ These historical fictions, however, Gray thought that were

compatible with the most refined and most highly developed systems of Law. Instead of being blameworthy, they are to be praised when skillfully and wisely used. . . . They should never be used, as the historic fictions were used, to change the Law, but only for the purpose of classifying established rules, and one should always be ready to recognize that the fictions are fictions, and be able to state the real doctrine for which they stand.⁶²

Lon Fuller would likely agree with Gray’s support for carefully used legal fictions to clarify legal rules. In fact, Fuller appears to have the most tolerance for legal fictions among scholars who have written on the subject. He defined a legal fiction as “either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility”⁶³ and viewed them not as creations intended to deceive, but rather as intellectual tools to facilitate legal reasoning and guide courts to the best decision for the case. Their utility made them acceptable—and less pernicious—to the law. To Fuller, a “court by proceeding *as if it were* determining the intent of the parties will normally reach a result that is in accord with the ‘good sense of the case.’”⁶⁴ Fictions guide as long as their author and his audience realize that they are false statements. However, according to Fuller, once a legal fiction is taken “seriously,” or “believed,” it “becomes dangerous and loses its utility”—although he did not elaborate on this point.⁶⁵

Scholars who have been critical of legal fictions have good reason to be wary about judicial candor. Legal fictions are imbued with the quality of falsehood and enable courts to tell a story about a case that is clearly untrue. Whether this is inimical to legislative authority or commendable as a form of judicial acumen depends on whether the author of the legal fiction and his audience are consciously aware of how that particular legal fiction affects broader social structures. As legal fictions allow the courts to tell a story that is imagined, legal fictions can be used to set norms for human behavior and social conduct. This is not a problem *per se*. The law is communicative in nature, as it informs us of our rights and duties and offers guidance as to

61. *Id.* at 35.

62. *Id.* at 37.

63. FULLER, *supra* note 2, at 9 (1968).

64. *Id.*

65. *Id.* at 9–10.

conduct our relationships. For this reason, Fuller calls the fiction a “linguistic phenomenon” that works as a play of words yet deeply influences thought.⁶⁶

B. Fictions in Human Thought

Legal fictions are used to overcome limitations in human language. Frequently the correct answer to a legal question cannot be found within expressed legal language and, when this happens, a normatively desirable outcome can only be reached through a legal fiction. By telling a different story about the case before it, the court is able to bridge a difficult legal question with what presiding judges see as right, moral, and ethical. In these situations, a legal fiction is indispensable in telling the different story and helping courts uphold legal values. As an example, fairness in dealings is an important value in every human transaction; the fiction of the constructive trust allows courts to uphold this value by making parties to an agreement conform to expectations to treat one another fairly. The fiction is pivotal in reaching a just outcome when expressed legal language would otherwise compel courts to a decision that thwarts the value of fairness.

The German philosopher Hans Vaihinger, to whom scholars writing on legal fictions often refer,⁶⁷ helps us see that the nature of legal inquiries is often ontological. Legal questions involve a search for the right, moral, or ethical answer according to social conventions and norms. On a more basic level, legal questions relate to the human condition and how individuals manage relationships and scarce resources in their environment. Legal inquiries aim to arrive at the most appropriate solution to interests between individuals and their broader society. These varied interests are not always reconcilable. Legal inquiries are therefore not just a dialogue around the vocabulary or words of the law but a deeper investigation into principles and standards essential to the well-being of individuals developing and forming relationships in a society.

These principles and standards, however, do not avail themselves of easy definition. A clear definition of morals, rightness, or ethics is elusive. Vaihinger, by showing how human beings construct artificial realities of the world—and fictionalize actual facts—shows how important fictions are in law. Use of legal fictions conveys the message that unconscionable conduct will not be condoned. For instance,

66. *Id.* at 11.

67. See, e.g., Annemarieke Vermeer-Künzli, *As If: The Legal Fiction in Diplomatic Protection*, 18 EUR. J. INT’L L. 37, 45–48 (2007); FULLER, *supra* note 2, at 94–106; R.A. Samek, *Fictions and the Law*, 31 U. TORONTO L.J. 290, 299–304 (1981).

courts' imposition of a fictional trust on parties who take unfair advantage of others conveys the importance of fair conduct in social arrangements. Vaihinger argues that fictions provide a systematic way of thinking about society and its values. To Vaihinger, a complete understanding of the world will always be out of reach as individuals lack the perception needed to fully grasp objective reality. Objective reality can only be inferred through these logical structures created by the mind.⁶⁸ As Vaihinger explains:

[T]he object of the world of ideas as a whole is not the portrayal of reality—this would be an utterly impossible task—but rather to provide us with an *instrument for finding our way about more easily in this world*. Subjective processes of thought inhere in the entire structure of cosmic phenomena. They represent the highest and ultimate results of organic development, and the world of ideas is the fine flower of the whole cosmic process; but for that reason it is not a copy of it in the ordinary sense. Logical processes are part of the cosmic process and have as their more immediate object the preservation and enrichment of the life of organisms The world of ideas is an edifice well calculated to fulfill this purpose; but to regard it for that reason as a copy is to indulge in a hasty and unjustifiable comparison. Not even elementary sensations are copies of reality; they are rather mere gauges for measuring the changes in reality.⁶⁹

According to Vaihinger, these intellectual constructs allow us to treat an impenetrable reality “as if” it matches our established—and more understandable—thought models. Vaihinger uses examples from various disciplines, from the physical sciences to philosophy, to show how we develop these mental constructs to make sense of an objective reality that is always beyond our grasp. For example, scientific classification of matter into elemental particles such as protons, electrons, and electromagnetic waves allows scientists to better explain the physical world. The particles themselves, however, cannot be readily observed or experienced through human perception. Quantum mechanics can only assume the existence of these particles because their effects on the physical world are observed.⁷⁰ Vaihinger also considers the atom a fiction.⁷¹ Vaihinger cites German philosopher Otto Liebmann,

68. VAHINGER, *supra* note 10, at 3.

69. *Id.* at 15–16.

70. TONY HEYS & PATRICK WALTERS, *THE NEW QUANTUM UNIVERSE* 12–13 (2003) (describing an experiment where electrons can be observed passing through slits on a thin metal plate even though the electrons themselves are not seen; they are assumed to have “boil[ed] off” a heated wire).

71. To Vaihinger, the atom is fictional to science. It is a fiction, in that it is a mental conception, which posits that matter is made up of infinitely small constituents not

who argues that “the atom is a transitional idea whose provisional character is obvious.”⁷² Like a constructive trust that bridges concrete rules of law with the more fuzzy values of equity in specific cases, the atom is an “interim concept” that allows “the chemist and the physicist [to coordinate] their laws, which they cannot yet formulate in a purely abstract manner” with the more practical practices of their fields.⁷³ Just as legal fictions uphold important values in the law, fictions in science create new and improved intellectual constructs to advance our understanding of the natural world.⁷⁴ To Vaihinger, most disciplines owe their progress to the use of “appropriate fictions and to the ingenious methods based upon them.”⁷⁵

Vaihinger identifies two largely unrelated disciplines—mathematics and law—that are especially similar in their reliance on fictions. In mathematics, fictions are essential because the field’s very ontology is built on a reality that is difficult, if not impossible, to fully grasp.⁷⁶ Many mathematical concepts, such as the perfect circle, the absolutely straight line, and infinity, are mental constructs mathematicians and scientists adopted to help them understand the realities of the physical and metaphysical world. These concepts establish a firm foundation upon which these fields may operate. To Vaihinger, fictions such as infinity and atoms help one understand the world and one’s surroundings in a more complete sense as they reduce spatial material to a comprehensible foundation and thereby provide prototypes through which scientific enterprise may unfold.⁷⁷ These

perceptible by ordinary human senses and therefore not within man’s experience. And while the notion of the atom comprises various contradictions in itself, the atom is so fundamental to scientific thought that without the atom, science fails altogether. *See* VAIHINGER, *supra* note 10, at 70–72. Yet, as Vaihinger points out, “with it, true knowledge and understanding is impossible.” The concept of the atomic structure “is a group of contradictory concepts which are necessary in order to deal with reality.” *Id.* at 71.

72. *Id.* at 71.

73. *Id.*

74. While Vaihinger acknowledges that concepts such as the atom have inherent contradictions, he believes use of the concept over time will obscure these initial contradictions as new constructs and fresh contradictions are called forth. *Id.* at 72.

75. *Id.*

76. The philosophical reality upon which mathematics is based is controversial among mathematicians and philosophers and it suffices to note that there is a general acceptance that there is a relationship between mathematics (however one defines it) and science (however one defines it). *See generally* Stewart Shapiro, *Mathematics and Reality*, 50 PHIL. SCI. 523, 525 (1983) (proposing that mathematics applies to reality through the discovery of mathematical structures underlying the non-mathematical universe).

77. Vaihinger, *supra* note 10, at 52–53 (“Empty space, and atoms interpreted in a material sense, seem to be [ideational] constructs, but in actual fact they are only

imagined principles are so useful because they help us understand practical matters like space, energy, and the composition matter, which we would have difficulty studying if the basic unit of matter and the concept of boundlessness were not available to us as intellectual tools.

Legal fictions operate the same way for the law. They produce logical synergies between abstract legal realities, such as achieving justice or arriving at the correct decision, and practical understanding in the field. To Vaihinger, jurisprudence is a logical field where analogies are often made between these fuzzy values and established rules of law so that an ultimate legal decision can actually make sense. We must be able to see the analogy between a person who takes unfair advantage of another, like a poor widow in *Binions v. Evans*,⁷⁸ and a trustee who breaches his trust obligations to his beneficiaries to recognize that the imposition of a constructive trust is the right decision in a case. Thus, the fiction of the constructive trust “consist[ed] in subsuming a single case under a conceptual construct not properly intended for it, so that the apperception is, in consequence, merely an analogy.”⁷⁹

As most laws are naturally limited in their coverage of those eventualities that may arise, unforeseen factual scenarios and legal problems must be subsumed within existing legal rules before a decision can be rendered. Law is a device to make sense of all of these interactions; legal fictions are sometimes needed to fit all these interactions into discrete, manageable boxes. Just as mathematicians must assume that a curved line is actually a series of small straight lines to study geometry, for instance, family lawyers treat adopted children as the biological children of their adoptive parents to develop the laws of inheritance and succession.⁸⁰ Because law and mathematics work off of inferences drawn from premises that are known or assumed to be true, Vaihinger views these two fields as fertile for the utilization of fictions. He states that “[a]part from mathematics, there is hardly any domain more suitable than law for the deduction of logical laws and their illustration, or the discovery of logical methods.”⁸¹

Fiction can serve a vital role in understanding law, mathematics, and a range of other fields. Yet Vaihinger emphasizes that these fic-

fictions. If, however, we succeed in reducing everything to these fictions then the world seems to be understood.”).

78. *Binions*, [1972] Ch. at 359.

79. Vaihinger, *supra* note 10, at 33.

80. *Id.* at 50.

81. *Id.* at 33.

tions may backfire if taken too far. In other words, fictionalized analogies used in these fields must not be confused with—and substituted for—reality, because errors in analysis occur when the lines between truth and imagination are not clearly drawn.⁸² The most useful legal fictions are those that are clearly and unmistakably fictitious. A landlord pursuing an action for rent is treated as if he evicted his tenant if he makes the property inhabitable; whether the landlord actually evicted the tenant is irrelevant because the deprivation of the tenant's right to quiet enjoyment and habitation of the property destroys the economic value of a leasehold.⁸³ Likewise, for the purposes of inheritance, an 80-year-old woman is treated in the same way as a 20-year-old woman because children borne by either one of them could affect the vesting of a gift, making it vest outside the period specified by the law on perpetuities. The utility of these fictions lie in their fictitiousness. When a statement is so blatantly false, it makes it clear to the practitioner or student of law that the law has to work in a particular way for society to properly function.

The use of legal fictions is expected when law functions as an expression of thought about the rules that govern social activity.⁸⁴ Man's ability to foresee and anticipate all contingencies that could arise from social activity is bound by the limits of perception. Hence, Fuller thought that some fictions, which he called "historical fictions," are used by the courts to subtly introduce changes in the law as these contingencies arise. These fictions "introduce new law in the guise of old."⁸⁵ The reliance on legal fictions to achieve these subtle changes could be for various reasons—to bring about policy changes, achieve stability in the law, avoid the inconvenience and expense of changing

82. *Id.* at 32 ("The logicians of the eighteenth century always regarded it as their duty to include error in a general way within their logical systems. We must therefore, as we have already stated, distinguish between *real analogies*, where discovery is the work of induction and hypothesis, and purely *fictional analogies* due merely to subjective method.").

83. For an example of the fiction of constructive eviction, see *Blackett v. Olanoff*, 358 N.E.2d 817, 818 (Mass. 1977).

84. This idea originates from John Searle's seminal contributions to the philosophy of language, where he suggests that language introduces a commitment on the part of its conveyor to convey the truth through his communication. This, in turn, grants the conveyor the capacity to create new phenomena such as rights, duties, government, private property, etc. Although Searle does not expressly state so, a corollary that follows his thesis is that one social and institutional reality created by the use of language would be a society's legal system. See Searle, *supra* note 7, at 37–41.

85. FULLER, *supra* note 2, at 56.

the law, and state a new principle in the simplest of terms.⁸⁶ As society develops, courts increasingly depend on legal fictions to extend the law to unanticipated societal changes that were not captured by legal rules at their time of enactment. Legal fictions bridge legal rules with evolving social norms, and thus reinforce the normative functions of law.⁸⁷

The fictions of the fertile octogenarian and the precocious toddler,⁸⁸ for example, allow courts to invalidate gifts to descendants too far removed from the testator and ease the testator's control of asset distribution long after he has died. These fictions support property exchange and social transactions by ensuring that valuable resources remain alienable and are not controlled by a remote testator who may no longer be alive.⁸⁹ Such fictions are beneficial to property law because they facilitate social interactions and economic engagement by signaling fundamental conventions about the law. Their blatant falsity reveals a somewhat obscured reality about the property system: that the alienability of property and free market exchange are essential to a fully functioning society. The limitations of human language made this subjective lie necessary to reveal the objective truth.

C. Troublesome Fictions

The benefits of legal fictions, however, must not obscure the potential trouble these fictions may cause to some areas of the law. Fictions are most likely to be troublesome in areas of the law that do not avail themselves of logical inquiry. Troublesome fictions have the capacity to trap the law into a tight logic that, paradoxically, makes the law illogical. While Fuller acknowledged that legal fictions can be dangerous if they are taken seriously or believed to be true, he does not elaborate on what he means by a legal fiction becoming "dangerous."⁹⁰ Here, I argue that fictions can become troublesome when they

86. *Id.* at 56–64. Fuller distinguishes these reasons by terming them "the *conservation of policy*, *emotional conservatism*, the *conservatism of convenience*, and . . . *intellectual conservatism*." *Id.* at 57.

87. BLACKSTONE, *supra* note 16, at *43 (stating that legal fictions are "highly beneficial and useful . . . [and] shall [not] extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law").

88. *See supra* text accompanying note 32.

89. Simes, *supra* note 29, at 709. *But cf.* Haskins, *supra* note 30 at 44–46 (arguing that the Rule Against Perpetuities was actually a compromise between the landed class generally hostile toward capitalist ideas and judges in seventeenth century England struggling to define the perpetuity period where a testator could reach beyond the grave and assert deadhand control over the distribution of property).

90. FULLER, *supra* note 2, at 10. *See also supra* text accompanying note 65.

obscure, rather than reveal, truths about the world we live in. By representing themselves as truth, fictions obscure reality and may even sometimes be accepted as reality. As Fuller pointed out, legal fictions can lose their usefulness and may even pose a danger to the legal system when they are used without the full realization or acknowledgement of their falsity because one can fail to see fictions for what they are: mere tools used as aids in legal reasoning.⁹¹ Vaihinger was also keen to emphasize that fictions, created to facilitate subjective understanding of one's external environment, are not real phenomena or manifestations. They do not have a corresponding objective reality or truth that can be grasped.⁹²

As a clear example of this misuse of legal fiction, consider the opinion of Lord Eldon in *Ex parte Whitbread*,⁹³ a case famous for introducing the doctrine of substituted judgment into property law. In *Ex parte Whitbread*, the niece of a lunatic—a person who was once of sound mind but was no longer⁹⁴—petitioned the court to have a portion of his estate distributed to her. Lord Eldon, who presided as the Chancellor of the Court of Chancery, granted her petition on the assumption that the lunatic would have made the allowance himself had he been able to—without even considering the lack of a relationship between the lunatic and his niece—because the lunatic would be humiliated if his family were “sent into the world to disgrace him as beggars.”⁹⁵ By substituting his judgment for that of the lunatic, Lord

91. *Id.* at 9 (“In practice, it is precisely those false statements that are realized as being false that have utility.”).

92. VAHINGER, *supra* note 10, at 49 (commenting on the use of fictions in the field of moral philosophy, Vaihinger states: “[T]he real principle of Kantian ethics [is] that true morality must always rest upon a *fictional* basis. All the *hypothetical* bases, God, immortality, reward, punishment, etc. destroy its ethical character, i.e.; we must act with the same seriousness and the same scruples as if the duty were imposed by God, as if we would be judged thereof, *as if* we would be punished for immorality. But as soon as this as if is transformed into a *because*, its purely ethical character vanishes and it becomes simply a matter of our lower interests, mere egoism.”). Vaihinger also cautions against mistaking a familiarity with the fiction for the truth of the matter when he, in describing “space” as a mathematical fiction, states: “[S]pace is a subjective construct because it is *full of contradictions*. It is a character of all true fictions that they contain contradictions and the concept of space is simply riddled with them. The conceptual construct of space has been invented and given form by the psyche with a view to bringing order into the events which it encounters—the chaotic and contradictory mass of sensations. Space is a construct with which we have become gradually familiar, and which on account of its familiarity appears to be real and entirely harmless.” *Id.* at 53.

93. *Ex parte Whitbread*, 2 Meriv. 99, 35 Eng. Rep. 878 (Ch. 1816).

94. Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 16 (1990).

95. *Whitbread*, 35 Eng. Rep. at 879.

Eldon redistributed private property without a clear donative or testamentary intent on the property owner's part. The doctrine of substituted judgment allows individuals to ask the court to make financial decisions for "lunatic" relatives who are incapable of managing their own financial affairs.⁹⁶ The idea behind this doctrine is to place the incapacitated individual's court-assumed preferences at the center of deliberation. Since that person is unable to express her preferences, the relative stands as a surrogate. This is where the doctrine becomes a fiction⁹⁷—courts substitute their own judgment for that of a lunatic and authorize gifts from the lunatic's estate to his "immediate relations"⁹⁸ when, in reality, the lunatic may neither have a relationship with the relatives nor have given them part of his estate. The problem with this fiction is that it allows the court to assume a subjective point of view that is unsupported by the reality of the case rather than search for observable evidence that reveal the lunatic's actual preferences. The doctrine of substituted judgment was used without a clear purpose and it is conjecture what Lord Eldon intended to achieve with its use.⁹⁹

The doctrine of substituted judgment has not been limited to the distribution of property to a lunatic's relatives, as originally conceived by Lord Eldon in *Ex parte Whitbread*. It has since been extended into the law of informed consent and applied to any situation where the "well-being of the ward" is affected. This includes cases in which the ward was an "idiot"—in other words, someone who never had any lucid intervals where his true preferences may have been gleaned.¹⁰⁰ Unlike the lunatic, an idiot had "no past periods of competency to hark back to" and "no future periods of competency to hope for."¹⁰¹ The potential for misuse of the doctrine of substituted judgment is greater with the case of an idiot than with a lunatic. While it may be possible to determine the judgment of a lunatic, it is impossible to do so for an

96. Harmon, *supra* note 94, at 16.

97. *Id.* at 22.

98. *Whitbread*, 35 Eng. Rep. at 878.

99. See Harmon, *supra* note 94, at 23 ("While Lord Eldon purported to enter the mind of the lunatic, he seemed to have made no effort to discover what had once been in Mr. Hinde's [the lunatic] mind. The *Whitbread* decision does not mention any evidence of Mr. Hinde's prior spending practices or his propensity for making gifts. Nor was the relationship between Mr. Hinde and his niece examined. . . . Rather, we get a rather bald assertion from Lord Eldon that granting the niece an allowance is only what Mr. Hinde himself would do 'if he were in a capacity to exercise any discretion on the subject,' and that granting the niece an allowance is only 'wise and prudent.'").

100. *Id.* at 16.

101. *Id.*

idiot who never had judgment to begin with. One cannot—and thus should not—substitute judgment for a person who never had any period of lucidity. As such a person was never capable of reasoned judgment, there could be no desires or preferences that the court could assume and for which it could substitute its judgment.

The deeply troubling aspect about importing the doctrine of substituted judgment into end-of-life medical care is that a doctrine that appears to have been developed to manage the property of a lunatic has now been used to deal with the life of a person who was not capable of reasoned judgment in the first place. Moreover, this doctrine is being applied not only to situations involving the ward's wealth but, more fundamentally, his health and well-being. The doctrine of substituted judgment has been applied for completely unrelated and essentially mismatched situations from the more benign situation that confronted Lord Eldon in *Ex parte Whitbread*. Applying the doctrine of substituted judgment to “the removal of vital tissues to the termination of life-support systems, from the sterilization of the mentally retarded to the forced medication of the mentally ill”¹⁰² is much more malignant and dangerous than applying it to the distribution of a lunatic's wealth. According to legal scholar Louise Harmon, the importation of the doctrine of substituted judgment into the law of informed consent allowed the state to “invade the bodily integrity of the incompetent without having to justify the invasion.”¹⁰³ By relying on the doctrine of substituted judgment, the courts are able to quietly make normative decisions where the greater utility is chosen for “others [who] are going to benefit from the use of the incompetent's body, by taking parts of the body, by relieving them of the presence of the body, by ensuring the barrenness of that body, or by restraining the body through chemistry.”¹⁰⁴ The difficulty with extending the doctrine of substituted judgment to cases where an invalid person, who is not—and never was—able to make decisions for his or her own well-being is that it allows the integrity of a human being to be made subservient to what the state assumes is in the patient's best interest.

Paradoxically, the doctrine of substituted judgment seemed to be intended as a judicial device to allow the court to act for the incompetent and manage his estate, including distribution of property to his relatives, *as if* the incompetent acted himself. The importation of this doctrine into the law of informed consent is troubling for several reasons. First, the justification for use of the fiction is unclear; we do not

102. *Id.* at 54.

103. *Id.* at 61.

104. *Id.* at 61–62.

know whether the doctrine was introduced to promote fairness between the parties, increase efficiency of legal rules, or set a normative standard. Second, the application of the doctrine to the distribution of property is less grim than its application to medical and end-of-life decisions. Though logical, the application of the doctrine of substituted judgment for these medical-intervention decisions is severely out of place. The trouble with such logical analyses is that broader sociological and ethical questions can be ignored. Oliver Wendell Holmes captured this point in *The Common Law*:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.¹⁰⁵

When legal fictions are embraced as if they are true representations of reality, instead of mere mental constructs that lead one to the truth, they cease to be useful. Fictions lose their utility as an aid in legal analyses when one uses them without full consciousness of their fictitiousness or recognition of their purpose as an intellectual link to a more fundamental—but less understood—reality.¹⁰⁶ The recognition of a legal rule as fictitious keeps that rule in the service of the legal system; its use helps more fundamental legal principles become discernible. However, when a legal fiction is taken literally or used without conscious awareness of its false premises, the fiction transforms into a legal rule that rigidly controls the legal system—as with the introduction of Lord Eldon's doctrine of substituted judgment into

105. O.W. HOLMES, JR., *THE COMMON LAW* 1–2 (1887).

106. FULLER, *supra* note 2 at 9–10 (“A fiction taken seriously, i.e., ‘believed’ becomes dangerous and loses its utility. It ceases to be a fiction” in that a fiction must either be “(1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.”).

property law and eventually medical cases. Rather than serve the legal system, such fictions cause trouble as more fundamental truths in the field or evidence that should be searched for are blurred by these conceits of the human mind. If not clearly seen to be fictitious, fictions may be taken to be lawfully, philosophically, and morally instructive.

Legal fictions can be particularly troublesome because they work as support structures to the law. For legal fictions that are not evidently false or explicitly acknowledged by the law to be false statements, it may become easy for the public to think that false legal statements are indeed true. When fictions in the law transform into binding legal principles—and as public acceptance of law as legitimate authority causes individuals to be desensitized to the fallacies of legal fictions—important evidence and logical arguments about fundamental legal, historical, and sociological truths about human ontology may be ignored or dismissed as irrelevant.¹⁰⁷

This self-deception defeats the very purposes for which fictions are employed. Since the purpose of legal fictions is to further understanding in the field, help us conceptualize reality, and establish common-ground for conversation and intellectual exchange, development in a field will be hindered when the use of fictions results in self-deception. The need to grapple with the more difficult reality in a field can be masked by a fiction that appears to be simple truth, causing people to miss the challenge to pursue deeper inquiries and understanding about the field. Blindness to the truth or one's choice to ignore it can effectively prevent further inquiry into other evidence and information that might lead to different and contradictory conclusions. The fiction, which was actually a figment of the intellect, appears to be a genuine and neat condition of the field. Ignoring the deeper truth through use of the fiction may keep the conversation within familiar grounds, but that also blurs pertinent—and often messier—questions and issues which need to be openly considered.¹⁰⁸

107. While the psychology and philosophy of self-deception is beyond the scope of this article, Daniel Goleman offers a compelling account of how self-deception works, the reasons the mind concocts self-deceits, and the effects of self-deception on the human psyche. See DANIEL GOLEMAN, *VITAL LIES, SIMPLE TRUTHS: THE PSYCHOLOGY OF SELF-DECEPTION* (1985). An interesting story of self-deception is the mind's ability to numb pain in situations of extreme anxiety. Goleman cites the "curious detachment" David Livingston felt when a lion attacked him and shook him vigorously and quotes Livingston as stating that when the lion shook him, "[i]t caused a sense of dreaminess in which there was no sense of pain nor feeling of terror, though [I was] quite conscious of all that was happening." *Id.* at 29 (second alteration in original).

108. *Id.* at 197–201 (describing how humans see what they want to see and hear what they want to hear by constructing their own social reality within "frames" as a

Thus, one may speculate that Professor Harmon's real concern with the importation of the doctrine of substituted judgment into the law of informed consent in medical cases is less with the importation of the legal fiction itself than with the law's pretense that the mental states and intentionality of a person who is permanently incompetent and who never had any period of lucidity can be objectively accessed and determined.¹⁰⁹ Reliance on the fiction of substituted judgment and the fallacy that the mind and intent of an incompetent patient can be objectively accessed by the court allowed courts to ignore factual evidence of the patient's true wishes¹¹⁰ and other indicia that a particular decision may not be in the patient's best interest.¹¹¹ The doctrine of substituted judgment did not further understanding about the law of informed consent. By allowing the court to substitute its judgment for that of an incompetent person, the doctrine allows courts to skirt around the hard questions that should be asked, such as the proper role of law when families petition the court to make health decisions for a person who is incompetent or the extent to which courts may violate the bodily integrity of an incompetent at the request of family members. The application of the doctrine of substituted judgment in the law of informed consent should—but does not—say something about the fundamental nature of the law and its role in difficult cases such as health matters for an incompetent.

On Harmon's account, the fiction of substituted judgment as used in the law of informed consent does not accomplish any of the worthy goals of legal fictions. Instead, the doctrine lets the law avoid more challenging and pressing questions about the morality of utility-based decisions by focusing on the fiction that judgment for the permanently incompetent person can be reasonably substituted. Substituting the

commonly shared understanding of social activity, the individual's role in that activity, and how that activity should play out according to an expected and assumed sequence of events called "scripts." These frames with scripts tell us what to focus our attention on and to ignore everything else outside that frame and script. The frame therefore "directs attention away from all the simultaneous activities that are out of that frame" and "defines a narrow focus where the relevant schemas direct attention, and a broad, ignored area of irrelevance.").

109. See generally Harmon, *supra* note 94 at 16.

110. *Id.* at 30–31 (citing *Sheneman v. Manring*, 107 P.2d 741 (Kan. 1940), where evidence indicated that Mr. Dautschmann did not have a relationship with his daughter and could not have given her money even if she was destitute was not considered by the courts).

111. *Id.* at 53–54 (citing *In re Byrant*, 542 A.2d 1216 (D.C. 1988), where the trial court ignored the possible harm to the patient's health from the administration of psychotropic drugs and substituted its judgment for the patient's to give her the drug because a "reasonable, competent person in the incompetent's situation would have" chosen to take the medication. *In re Bryant*, 542 A.2d at 1220.).

court's judgment for the incompetent's can easily explain court decisions to remove vital tissues, terminate life-support systems, sterilize, and forcibly medicate the mentally retarded with psychotropic drugs at the request of a guardian. Utility-based decisions are often made because someone benefits from "the use of the incompetent's body," such as "by taking parts of the body, by relieving them of the presence of that body, by ensuring the barrenness of that body, or by restraining that body through chemistry" at the expense of the incompetent.¹¹² The fallacy that judgment can be substituted by objective means obscures a more important ethical and moral issue that should be discussed openly. As Harmon points out, "taking organs from incompetents, terminating their life-support systems, sterilizing them, and forcing psychotropic medication upon [incompetent individuals] all raise deeply disturbing moral issues. And those deeply moral issues should be examined by the light of day, not hidden in the dark."¹¹³ An examination of these moral issues may help us arrive at a more fundamental truth about some of the most important values of the law, or at least challenge us to figure out what those values are.

The doctrine of substituted judgment is but one example of a troublesome fiction. Generally speaking, fictions become troublesome because we do not see them for their falsity and believe that they are accurate statements of reality. Troublesome fictions may be taken as statements about reality, and they must be treated with caution and skepticism. Otherwise, they may obscure more important legal questions tucked beneath the austerity of the fiction. As fictions are able to both clarify and obscure thinking about our reality, it may be useful for jurists and academics to engage in more robust conversations about the proper rationale for legal fictions and how they are used to facilitate the application of legal rules so that clearer, more precise thinking about the law may take place. As it appears, legal fictions are not discussed as much today as they once were.¹¹⁴ But more recent scholarship by academics, such as Peter J. Smith¹¹⁵ and Nancy J.

112. Harmon, *supra* note 94, at 61–62.

113. *Id.* at 62–63.

114. *Id.* at 1 ("The legal fiction used to be a hot topic on the jurisprudential agenda. It was written and talked about passionately by those who wrote and talked about such things in the nineteenth and early twentieth centuries. Then interest in the subject withered and died, and virtually fell off the vine."); see also Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 874 (1986) ("Hardly anybody in the United States talks much about legal fictions these days.")

115. See generally Smith, *supra* note 52, at 1437 (exploring six reasons why judges rely on new legal fictions—legal fictions that "a judge deploys . . . in crafting a legal rule on a factual premise that is false or inaccurate"—and suggesting that although judges may have great reasons to rely on new legal fictions, judges also do not gener-

Knauer,¹¹⁶ has discussed the emergence of newer types of legal fictions in the practice of law. These commentaries indicate that there is much more to be said about legal fictions and the legal institution's dependency on these fictions to support the smooth operation of the law. Continuous discussion and acute awareness of legal fictions and their impact on law is important because fictions can become troublesome when they hide, rather than reveal, truths about the world we live in.

Although legal fictions are in themselves benign and even essential to maintaining the law's integrity, they can also be harmful to legal analysis and critical thinking about legal principles. It will become more difficult to think clearly about what a law ought to achieve and make sense of it when legal institutions replace social and economic realities with fictionalized suppositions about people, norms, and beliefs. The essence or core morality of the law to preserve human dignity and the common good will be lost should legal fictions be used carelessly to a point where they conceal underlying truths about an injustice or inequity and prevent remedial measures from being taken.¹¹⁷ In hiding normative choices that courts make, legal fictions may also produce the very unfairness that they were intended to prevent.¹¹⁸ That "[s]omething hidden, something potentially dangerous or brutal [that] can go beneath the surface of a legal fiction"¹¹⁹ is perhaps the unfairness, the iniquity, and the immorality that would likely result

ally acknowledge the falsity of their premises. For this reason, new legal fictions may deceive the public and hide the normative choices that judges make).

116. See Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1 (2010) (describing the use of new legal fictions in the areas of empirical legal studies, law and literature, and complex statutory schemes, and distinguishing these new fictions from classical fictions which are transparently and demonstrably false; Knauer argues that more recent scholarship on new legal fictions change—rather than add on to—conversations about the law because this scholarship involves analyses of fictions that are assumed to be, but cannot be proven to be, false).

117. The idea that the essence of the law is the preservation of human dignity and the common good stems from the writings of classical natural lawyers. Aristotle, for example, claimed that there is a "natural" way to govern people and protect the community's interest in what is just. ARISTOTLE, *NICOMACHEAN ETHICS* 92–93 (Roger Crisp ed. & trans., 2011). See also ST. THOMAS AQUINAS, *ON POLITICS AND ETHICS* 44 (Paul E. Sigmund ed. & trans., 1988) ("law must concern itself . . . with the happiness of the community."). In a recent article, Leslie Meltzer Henry documented the frequency in which the ideal of dignity is evoked in Supreme Court decisions, noting that more judges are depending on the concept of dignity to reach hard constitutional decisions. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178–81 (2011).

118. Smith, *supra* note 52, at 1439 ("judges' purported factual suppositions sometimes are devices, conscious or not, for concealing the fact that the judges are making normative choices in fashioning legal rules.").

119. Harmon, *supra* note 94, at 70.

from the irresponsible use of legal fictions. We, as jurists and scholars, must see the unfairness, the iniquity, and the immorality that can sometimes be hidden beneath a legal fiction and deal with it appropriately by recognizing the concealed reality.

The remainder of this paper examines a fiction in the copyright system that is potentially troublesome: the doctrine of deemed authorship. Deemed authorship attributes the status of author to the employer who engages creative talent to produce works for hire. The concept is particularly troublesome as a legal fiction because it puts the employer in the same category as the creator of the work without making finer distinctions about their contribution to the final product. The fiction of the employer-author obscures important constitutional questions left unanswered about who an author is and what the law expects of a person designated as an “author.”

To analyze the potentially troublesome effects of the fictionalized employer-author and discuss the analytical difficulties in the concept of deemed authorship, the remaining portions of this paper examine the concept of deemed authorship and its rationale, history, and institutionalization in copyright law. This part of the article juxtaposes the rationale, history, and institutionalization of the fiction against more fundamental questions about originality, authorship, and the role of markets in promoting the progress of science that permeates throughout copyright law and theory. What follows will be a discussion of how to engage with the legal fiction and recognize its falsity in order to initiate a conversation about the more difficult questions in copyright law. As a final observation on the doctrine of deemed authorship, this paper contemplates the benefits for the legal system when a legal fiction does not deceive, but rather illuminates the law and makes the law a more effective language that communicates conventional behavioral expectations between a legal institution and its subjects.

II.

ANALYTICAL DIFFICULTIES IN THE CONCEPT OF DEEMED AUTHORSHIP

It may be fitting to start the discussion on deemed authorship by noting that central to the copyright system is the rule on originality, which requires a literary or artistic work to originate from and be original to an “author.”¹²⁰ Before copyright law will consider a literary

120. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991) (holding that names, town, and telephone numbers of utility subscribers are not copyrightable, since they do not originate from an author).

and artistic work sufficiently creative to be eligible for copyright protection, the work must be conceived by an author, who for all intents and purposes is the actual creator of the work.¹²¹ An author must write his book, a composer must compose his music, and an artist must paint his picture for copyright law to apply. This rule precludes works that are mere copies of another work from copyright protection, as copies are unoriginal and therefore cannot be attributed to an “author.”¹²² A pirate is not an author because he copied the work and did not create it; the work did not originate from him. The author therefore, being the person from whom the work originated, is pivotal to copyright. An unauthorized use of a work will never be an infringement of copyright if the individual asserting infringement is unable to prove that the work was a product of original thought, conception, and intellectual production. The work must owe its origins to an author.¹²³

The concept of deemed authorship is the notable exception to this rule. It modifies the rule that a work must be original to the author to be classified as a “work of authorship” by allowing someone other than the true creator of the work to be deemed the author and first owner of the copyright.¹²⁴ This practice was initially contemplated by the courts during the 1860s. In this period, the courts tried to manage assignments of copyright between an employer and its employee and default rules for the initial allocation of ownership rights in creative

121. *Id.* at 345–46 (“The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. . . . Original, as the term is used in copyright, means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.” The Court goes on to say that “[o]riginality is a constitutional requirement” and that it is “unmistakably clear” that the terms “authors” and “writings” “presuppose a degree of originality.”).

122. The rule was codified in Section 102 of the Copyright Act 1976, which states that “[c]opyright protection subsists, in accordance with this title, in *original* works of *authorship* fixed in any tangible medium of expression.” Act of Oct. 19, 1976, ch. 1, 90 Stat. 2541, 2544 (codified as amended at 17 U.S.C. § 102 (2012)) (emphasis added).

123. *Burrow-Giles v. Saroni*, 111 U.S. 53, 59–60 (1884) (limiting copyright to the kind of work that “embod[ies] the intellectual conceptions of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author,” and requiring that, to prove infringement, “the existence of those facts of originality, of intellectual production, of thought, and conception” must be shown). See *L. Baitlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976) (sustaining a preliminary injunction restraining the enforcement of copyright because the work was essentially a copy of a design patent in the public domain and therefore lacked originality).

124. Usually, the actual author is considered the first owner of copyright. Section 201(a) of the Copyright Act of 1976 states: “Copyright in a work protected under this title vests initially in the author or authors of the work.” Act of Oct. 19, 1976, ch. 2, 90 Stat. 2541, 2568 (codified as amended at 17 U.S.C. § 201(a) (2012)).

works had to be established.¹²⁵ Before the mid-nineteenth century, courts treated each creative work as belonging to the person who created it. The default rule at that time was that a creator was the author, who had to expressly sign away his rights before a court would conclude that another person owned the copyright in the work. Hence in *Heine v. Appleton*,¹²⁶ for instance, the court held that the drawings of an artist, who accompanied Commander Perry to Japan and the China Sea on an expedition funded by the U.S. government in 1852–54, belonged to the United States because Heine expressly agreed to hand over property in the drawings to them.¹²⁷

Courts began to modify this doctrine as they faced more cases where numerous people participated in the creative process. This called for someone—often the creators’ employer—to represent the collective as owner of the copyright.¹²⁸ An additional reason for this change in the default position was because more employers were participating in the employee’s creative process. One example is the 1885 case of *Schumacher v. Schwencke*, where the Court of Appeals in New York decided that a corporation owned the copyright in an employee’s work because the corporation’s president, himself a respectable artist, was personally involved with and had supervised the design and production of the employee’s creative work.¹²⁹ Eighteen years later, in *Bleistein v. Donaldson Lithographing Co.*, employees of the plaintiff, a chromolithography company, prepared three chromolithographs for a circus advertisement, which were then copied by the defendant. The Supreme Court awarded ownership of the designs to the plaintiff company, stating that the drawings were “produced by persons employed and paid by the plaintiffs in their establishment to make those very things,”¹³⁰ thus taking a more affirmative stance that employers owned their employees’ work by virtue of their position as the employer. But even as these cases held that the employer was the *owner*

125. Catherine Fisk, *Authors at Work: The Origins of the Work-For-Hire Doctrine*, 15 *YALE J. L. & HUMAN.* 1, 33–43 (2003) (describing the law’s transition from favoring the author to favoring the employer by basing their decisions on other factors besides originality in a copyrightable work, such as making adaptations to the work and owning workplace knowledge). The default rule at that time was, however, pro-employee. A principle that favored employer ownership of copyright slipped in over time in the dicta of several cases. *Id.* at 44.

126. *Heine v. Appleton*, 11 F. Cas. 1031, 1032–33 (C.C.S.D.N.Y. 1857) (No. 6324).

127. Fisk, *supra* note 125, at 30.

128. *Id.* at 32.

129. *Schumacher v. Schwencke*, 25 F. 466, 466 (C.C.S.D.N.Y. 1885). *See also* *Mut. Adver. Co. v. Refo*, 76 F. 961, 963 (1896).

130. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 248 (1903).

of property in the copyrighted work, they fell short of holding that the employer was also the *author* of the work.

This changed when the concept of deemed authorship was codified into Section 62 of the 1909 Copyright Act¹³¹ and later into Section 201(b) of the current Copyright Act of 1976¹³² as the work-for-hire doctrine.¹³³ Section 62 of the 1909 Act considered an employer the author of the work if its employee created a work for hire.¹³⁴ Likewise, Section 201(b) of the Copyright Act of 1976 states that “[i]n the case of a work made for hire, the employer or other person for whom

131. Section 62 states: “[T]he word ‘author’ shall include an employer in the case of works made for hire.” Act of March 4, 1909, Pub. L. No. 60-349, § 62, 35 Stat., 1075, 1088 [hereinafter “Copyright Act of 1909.”].

132. Section 201(b) states: “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” Act of Oct. 19, 1976, ch. 2, 90 Stat. 2541, 2568 (codified as amended at 17 U.S.C. § 201(b) (2012)).

133. The work-for-hire doctrine in copyright law is the embodiment of the fiction of the employer author. The doctrine treats an employer, who employs a creator who produces literary and artistic works, as the author of the work and not merely the owner of copyright. The idea of attributing authorship status to someone other than the author was not employed by the courts as rhetoric to remedy an injustice or adjust laws to evolving social conditions. Instead, the concept of deemed authorship was used to assure the transferability of authorial status (and with it the initial allocation of copyright) and grant property rights in creative works to the party who employed the creator. In allocating authorial rights over the work to an employer, copyright law chose to protect the work’s economic value but by doing so, compromised on protecting the creator’s human dignity, and minimized any personal connection that the creator may have the work.

In the two cases before the work-for-hire doctrine was codified into the Copyright Act of 1909, the courts held that the employer and the commissioner of a work owned the copyright to it. See *Collier Engineer Co. v. United Correspondence Schools*, 94 F. 152 (C.C.S.D.N.Y. 1899); and *Dielman v. White*, 102 F. 892 (C.C.D. Mass. 1900). In *Dielman* the court stated:

In general, when an artist is commissioned to execute a work of art not in existence at the time the commission is given, the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily upon the artist himself. If a patron gives a commission to an artist, there appears to be a very strong implication that the work of art commissioned is to belong *unreservedly and without limitation* to the patron.

Id. at 894 (emphasis added).

The work-for-hire doctrine is reminiscent of the patronage system of the pre-literary marketplace of the late seventeenth and eighteenth centuries where authors provided literary services for wages and certain state privileges. At that time, “the concept of an author owning a work did not quite fit the circumstances of literary production in the traditional patronage system.” MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 16–17 (1993).

134. Copyright Act of 1909, *supra* note 131.

the work was prepared is considered the author for purposes of this title.”¹³⁵ With statutory codification now, the employer is not just *owner* of the copyright; he is also the *author* of the work. The fiction that authorship can be alienated from the true creator and deemed on anyone else came to be entrenched into the law with the passing of these statutory provisions.

Deeming authorship on someone other than the true creator of the work has its utility. This notion allows the law to treat a single person or entity as the author and first owner of copyright in situations where many individuals collaborate to produce creative works. In such cases, one person or entity, whose name is used to disclose the work to the public, is represented to the world as the author of the collective work.¹³⁶ Peer production over Internet content also involves many individuals who collaborate in a decentralized way by relying on social—rather than economic—incentives to produce new forms of information, knowledge, and cultural materials on a massive scale.¹³⁷ Deemed authorship is a useful tool to mobilize millions of individuals to collaborate with a designated “author” on a creative project which they believe in and support—even when not remunerated financially.¹³⁸ The “author” in this case has strong mobilizing power if it is an organization that possesses a strong online presence, a well-respected reputation, and the ability to draw crowds.

Deemed authorship is also useful in designating a single party as the initial owner of copyright for works that are an accumulation of different creative components. Cinematographic works are a prime example. As cinematographic works require creative input from multiple sources, a cinematographic work would most likely be a joint collaboration with multiple copyright owners but for the work-for-hire doctrine.¹³⁹ Deeming authorship on a single entity significantly reduces

135. Act of Oct. 19, 1976, ch. 2, 90 Stat. 2541, 2568 (codified as amended at 17 U.S.C. § 201(b) (2012)).

136. SAM RICKETSON & JANE C. GINSBURG, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS: THE BERNE CONVENTION AND BEYOND* 367 (2006).

137. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 81 (2006).

138. Many of these non-commercial projects involve pursuits that are scientific and involve inquiries for the common good of society. Individuals participate to contribute to a worthy goal. For example, the SETI@home project involves the search for extra-terrestrial intelligence; Folding@home is a protein folding stimulation aimed at curing Alzheimer’s, Huntington’s, Parkinson’s, and many other diseases; FightAIDS@Home runs drug design software to evaluate the right candidate for drug discovery; and Genome@home models artificial genes that can be used to generate useful proteins. *See id.* at 82–83.

139. Section 101 of the 1976 Copyright Act defines a work for hire as: “(1) a work prepared by an employee within the scope of his or her employment; or (2) a work

transaction costs of seeking multiple licenses from various contributors to a cinematographic work.¹⁴⁰ Deeming authorship on the employer or commissioner of a work may also allow the work to be distributed to the public more cheaply.¹⁴¹

The fiction of the deemed author may be efficient for all these reasons. It may also be equitable in some situations to grant initial ownership of copyright to the author's employer or the work's commissioner. Through the work-for-hire doctrine, initial ownership of copyright may be allocated to a single entity who may present the work to the public as its author and owner. The fiction creates a bright-line rule that is easy to apply. It simplifies the licensing of collaborative works; it encourages employers, commissioners, and connoisseurs of art to invest in creative talent; and it allows creative works to be more efficiently distributed to the public. There is no doubt that the fiction is useful—as most legal fictions are.

While the concept of deemed authorship may be useful in consolidating a multitude of ownership rights stemming from multiple acts of authorship, designating the employer of creative employees as the *author* of the work appears specious. Some scholars have asked for studies to be conducted to evaluate the implications of the work-for-hire doctrine¹⁴² and while no actual data are available, it has been hypothesized that such studies may reveal that deeming authorship on someone other than the actual creator compromises the authenticity

specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” Act of Oct. 19, 1976, ch. 1, 90 Stat. 2541, 2544 (codified as amended at 17 U.S.C. § 101 (2012)).

140. John L. Schwab, *Audiovisual Works and the Work-For-Hire Doctrine in the Internet Age*, 35 COLUM. J.L. & ARTS 141, 146 (2011).

141. I.T. Hardy, *An Economic Understanding of Copyright Law's Work-Made-For-Hire Doctrine*, 12 COLUM.-VLA J.L. & ARTS 181, 181 (1988) (arguing that the work-for-hire doctrine allocates copyright with the person most able to exploit the work and bring it to the attention of the public because they have “greater resources, experience, or better market position.”).

142. Richard Colby, *Works Made for Hire in International Copyright Law*, 3 LOY. L.A. ENT. L. REV. 87, 87 (1983) (noting that Professor Mario Fabiani of Rome University has suggested that scholars initiate studies on the problems related to the protection of “salaried authors”). See also Rochelle Cooper Dreyfuss, *The Creative Employee and the Copyright Act of 1976*, 54 U. CHI. L. REV. 590, 638 (1987) (suggesting that studies should be done for institutions that try to assert authorship over academic writings).

and quality of work produced.¹⁴³ Since the fiction of the employer-author is a concept that contradicts what is socially and perhaps intuitively known of a human creator and author of a creative work,¹⁴⁴ a study of its implications on creative output may help us understand how pecuniary and non-pecuniary rewards affect the production of creative works in terms of their value to progress. Contextualizing the fiction of the employer-author would allow for conversations about other under-conceptualized but important areas of copyright law, such as the role of the author in promoting progress together with the notions of authorship, originality, and authenticity and what they actually mean or should mean in the law, to begin earnestly.

Analytical difficulties with the concept of deemed authorship may stem from the fact that copyright law has a very nebulous idea of the author. This may be less of a concern if our understanding of who the author is and what authorship actually means in the law were sound. But we don't have a clear understanding of the author or authorship. As the author is considered by law to be the person from whom a work originates and is important in determining consequential issues in copyright law such as the durational span of the copyright term,¹⁴⁵ claims to moral rights,¹⁴⁶ and termination or renewal of copy-

143. Dreyfuss, *supra* note 142, at 591 (arguing that the progress of science is dependent not only on the quantity of creative works produced but also on the quality of these works).

144. Normally, the author is someone who is somehow connected personally to the work because he or she created it. See *Burrow-Giles*, 111 U.S. at 58 (defining the author as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."). In *Bleistein v. Donaldson Lithographic Co.*, the court decided that chromolithographs used to advertise a traveling circus may be copyrightable because, though they were intended to reproduce actual things, they were also the "personal reaction of an individual upon nature." Justice Holmes, who wrote the decision went on to state: "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone." *Bleistein*, 188 U.S. at 250.

145. Generally, the copyright duration for works is measured against the life of the author. Under Section 302(a) of the 1976 Copyright Act, a copyright shall endure for a term "consisting of the life of the author and 70 years after the author's death." 17 U.S.C. § 302(a)-(b) (2013).

146. Moral rights are the non-assignable, non-waivable personal and creative rights of the author that protect the author's integrity and personality. They are conceptually different from the author's economic rights, which are transferrable and waivable under the law. Under Section 106A(a) of the 1976 Copyright Act the author of a work of visual arts is entitled to claim authorship or deny authorship to a work that has been distorted, mutilated, or modified in a manner that would be prejudicial to the author's honor or reputation. The author also has the right to prevent the distortion, mutilation, or modification of a work that would be prejudicial to his honor or reputation and also prevent the destruction of a work of recognized stature. Section 106A(b) of the Copy-

right,¹⁴⁷ it is ironic that the author is not explicitly defined in the law. Section 102 of the 1976 Copyright Act defines a work of *authorship* with more precision to include works of a literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, or audiovisual nature.¹⁴⁸ From that, one may presume that these works must be created by a natural person.¹⁴⁹ But for some inexplicable reason, neither U.S. statutory law nor case law has confined the definition of the “author” of a literary and artistic work to natural persons. The author does not have to be the individual who successfully translates an idea or mental imagery into literary, musical, or artistic expressions.¹⁵⁰ It has also not

right Act 1976 states that only the author of the work has these rights. 17 U.S.C. § 106A(a)–(b) (2013).

147. Under Section 24 of the Copyright Act of 1909, the copyright term was divided into two separate terms of 28 years each. The renewal right to the second copyright term belonged to the author of the work and his spouse and/or children if the author is no longer alive at the time of copyright renewal. This durational division of copyright term was brought under the Copyright Act of 1976 for works that were still protected by copyright as of Jan. 1, 1978 and provided authors with an additional right to terminate license grants for the second copyright term. Under Section 304(c) of the Copyright Act of 1976, the author of the work created before Jan. 1, 1978 is entitled to terminate licenses granted over the renewal copyright or any right under it. Section 304(c) expressly excludes works for hire. See 17 U.S.C. § 304(c) (2013).

The Copyright Act of 1909 with two copyright terms applies to works published in compliance with copyright formalities before Jan. 1, 1978, and the 1976 Act with a single copyright term applies to works fixed in a tangible medium of expression after Jan. 1, 1978.

148. “Works of authorship” is defined as including literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works. 17 U.S.C. § 102(a) (2013).

149. The Court of Appeals for the Ninth Circuit seemed to suggest just that when it stated that the word “author” in the copyright statute “is taken from the traditional activity of one person sitting at a desk with a pen and writing something for publication.” The court goes on to state that “[t]he word is traditionally used to mean the originator or the person who causes something to come into being, or even the first cause, as when Chaucer refers to the ‘Author of Nature.’” *Aalmuhammed v. Lee*, 202 F.3d 1227, 1232 (9th Cir. 2000).

150. The Copyright Act of 1976 does not define who an author is under its definitions section, Section 101. Neither does the Copyright Act of 1909 in its definitions section. Other than the statements that the author is the creator of an expressive work, very little else has been said of the author in case law. See *generally* *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53. It is also worthy to note that while the court in *Aalmuhammed* indicated that an author should be a human person who creates a work, the issue the case centered on the ownership rights of a subject matter expert, who made creative contributions to a movie and attempted to claim joint ownership for his contributions to the script as a co-author. Since Warner Brothers as the producer of the movie made everyone who worked on the movie sign work-for-hire agreements, it—a movie studio—was considered the actual author of the work. *Aalmuhammed*, 202 F.3d at 1230. For a discussion of the issues in this case and the special problems with authorship in the movie industry, see F. Jay Dougherty, *Not a*

helped that the main international convention on copyright law, the Berne Convention for the Protection of Literary and Artistic Works, aiming to protect the “rights of *authors* in their literary and artistic works,”¹⁵¹ has also been silent on the definition of “author.” This has inevitably caused uncertainty about authorship among different jurisdictions.¹⁵² However, it should be noted that some countries have copyright laws that reserve authorial status only to natural persons, and not juridical persons or corporations.¹⁵³

Recognizing that individual authors may have personal connections with the work may encourage artistic and authorial commitment to producing authentic expressions for the progress of science.¹⁵⁴ Given that the law’s goal to promote progress of science is attained through the writings of authors,¹⁵⁵ the law encourages authors to create through exclusive rights granted over creative expressions.¹⁵⁶ The grant of these rights presupposes that economic incentives are the primary motivation for creativity, as the theory goes, the assignment and

Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law, 49 UCLA L. REV. 225 (2001).

151. The Berne Convention on the Protection of Literary and Artistic Works states: “The countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.” Berne Convention on the Protection of Literary and Artistic Works, art. I, 828 U.N.T.S. 221, S. Treaty Doc. No. 99–27 [hereinafter “Berne Convention”].

152. See PASCAL KAMINA, *FILM COPYRIGHT IN THE EUROPEAN UNION* 131 (2002) (“There is no definition of the term ‘author’ in the Convention, and its usual meaning it still the subject of controversy.”). Although, from the inception of the Berne Convention, the term “author” has been understood to mean a natural person and not a legal or juristic person. See RICKETSON, *supra* note 136, at 358 n.3.

153. For instance, the French copyright system reserves authorship for natural persons. See Jean-Luc Piotraut, *An Authors’ Rights-Based Copyright Law*, 24 CARDOZO ARTS & ENT. L.J. 549, 561 n.75 (2006). Under art. 7 of the German Copyright Law of 1965, the author is the creator of the work, however, the law excludes juridical persons from the definition of the “creator of the work.” Only natural persons can be considered the author of the work. See also GRAHAM DUTFIELD & UMA SUTHERSANEN, *GLOBAL INTELLECTUAL PROPERTY LAW* 86 (2008) (discussing both French and German laws).

154. *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (noting that the main goal of the copyright system is to “advance public welfare through the talents of authors and inventors”).

155. The Constitution of the United States empowers Congress to “promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.” U.S. CONST., art. I, § 8. “The Progress of Science” in the Constitution is generally taken to mean “the creation and spread of knowledge and learning” or the “proliferation of knowledge.” See *Golan v. Holder*, 132 S.Ct. 873, 888 (2012); *Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003).

156. These rights are the rights to reproduce the work, prepare derivative works based on the work, distribute the work, perform the work publicly, display the work publicly, and in the case of sound recordings, perform the work by means of a digital audio transmission. 17 U.S.C. § 106 (2013).

transfer of these rights allow authors to capture the economic value of their work, which in turn encourages creativity.¹⁵⁷ It is also important to consider whether works that are less authentic but more “marketable” have as great an impact on the progress of science as more authentic works.¹⁵⁸

The Constitution itself contemplates the alienation of ownership of specific rights granted under the law.¹⁵⁹ But this does not mean that it permits the alienation of authorship through the fiction that another person—other than the true creator—could be deemed author. Judge Friendly seemed to recognize the problem with the fiction of deemed authorship when he noted in a dissenting opinion¹⁶⁰ that the Constitution “authorizes only the enactment of legislation securing ‘authors’ the exclusive right of their writings” and that it “would thus be quite doubtful that Congress could grant employers the exclusive right to the writing of employees regardless of the circumstances.”¹⁶¹ Some copyright scholars have expressed similar concerns about the constitu-

157. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.’”) (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932)).

158. Universities, for example, allow for more authentic expressions because of the academic freedom guaranteed to its teachers. Creative works from universities have a different impact on progress than creative works from economic-driven organizations. *See, e.g.,* Roberta Rosenthal Kwall, *Moral Rights for University Employees and Students: Can Educational Institutions Do Better Than The U.S. Copyright Law?*, 27 J.C. & U.L. 53, 79 (2000).

159. The U.S. Constitution allows Congress to grant copyrights, property rights over creative works, that can be transferred and exchanged for market rewards to encourage authors to be creative. U.S. CONST. art. I, § 8, cl. 8. *See also* *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’ Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”).

160. *Scherr v. Universal Match Corp.*, 417 F.2d 497, 502 (2d Cir. 1969) (Friendly, J., dissenting), *cert. denied*, 397 U.S. 936 (1970).

161. *Id.* The drafters of the Copyright Act of 1909 appeared to have thought that the Constitution intended to limit the word “author” to the original author of the word and “possibly . . . frustrating the attempt to vest ownership in employers.” Bracha, *supra* note 15, at 263. It is speculated that the drafters provided a statutory definition of the author to include an employer to circumvent the Constitutional limitation. By so doing, “[a]uthorship, as a constitutional requirement, was simultaneously accorded due respect and defined out of existence.” *Id.*

tionality of the work-for-hire doctrine.¹⁶² Similarly, the authors of a leading copyright textbook highlighted constitutional concerns with deeming authorship on the employer:

[A]n employer *qua* employer cannot by definition be regarded as an “author” and therefore in the absence of an assignment from his author-employee may not constitutionally be entitled to claim copyright. . . . A constitutional defense of Sec. 201(b) of the current Act, and of Sec. 26 of the 1909 Act merely on the basis that Congress has created a sort of legal fiction in regarding an employer as the author renders meaningless the Copyright Clause’s use of the term. If Congress may “deem” an employer to be the author, is there any limit to the other classes of persons (besides the true author) who may be the recipient of Congressional beneficence in this manner?¹⁶³

Aside from arguments about its constitutionality, deeming authorship on someone other than the true creator of the work may also run counter to logic and experience and significantly affect social and/or cultural norms. Creativity and authorship are intellectual activities that are innately human and cannot be divested, as cognitive processes and expressions are as unique to an individual as his or her thumb print.¹⁶⁴ Furthermore, many authors identify their work as their personal creation and expression, which communicates to the rest of the world who they are, what they think, and how they feel.¹⁶⁵ Yet when corporate employers and commissioners of creative individuals are

162. Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1090 (2003) (“Whatever the practical merits of the work for hire doctrine, the constitutional text supplies no grounding for it.”); Mark H. Jaffe, *Defusing the Time Bomb Once Again—Determining Authorship in a Sound Recording*, 53 J. COPYRIGHT SOC’Y. U.S.A. 139, 197 (2006) (“The Constitution provided Congress with the power to grant rights to those who create original works of expression. If those rights are denied to those who ought to be entitled, the validity of Congress to enact and enforce laws under the Copyright Act is undermined.”); Roberta Rosenthal Kwall, *Authors in Disguise: Why the Visual Artist Rights Act Got It Wrong*, 2007 UTAH L. REV. 741, 749–50 (“By simply positing that the employer becomes the author, the work-for-hire doctrine gives no consideration to the consequences of deeming the employer to be the physical source of the creation.”).

163. MELVILLE B. NIMMER ET. AL., CASES AND MATERIALS ON COPYRIGHT AND OTHER ASPECTS OF ENTERTAINMENT LITIGATION INCLUDING UNFAIR COMPETITION, DEFAMATION, PRIVACY 373 (2005) (citing *Bailey v. Alabama*, 219 U.S. 219, 239 (1911), which states that the “power to create presumptions is not a means of escape from constitutional restrictions.”).

164. Tom Cochrane, *Expression and Extended Cognition*, 66 J. AESTHET. ART CRIT. 329 (2008) (arguing that there is an “extremely intimate connection between the emotional content of the music and the emotional state of the person who produces that music.”).

165. John T. Cross, *An Attribution Right for Patented Inventions*, 37 U. DAYTON L. REV. 139, 146 (2012) (“Creating a work of art or literature can be an intensely per-

recognized as the actual author of the work and initial owner of copyright, the law deprives the real creator of his identity as the author of the work. If the identity of an individual as the author *qua* author can be isolated and deemed on another, there is inherent legal significance in who created the work. By deeming an employer or a commissioner of a creative work as the work's author, the actual author easily becomes disenfranchised from the role he or she has in promoting progress through creative expression.¹⁶⁶

While there are certain advantages to the doctrine of deemed authorship, Fuller's¹⁶⁷ and Vaihinger's¹⁶⁸ caution that fictions be only used with full awareness of their falsity must be borne in mind. A fiction is neither truth nor reality: it is a mere conceptual construct invented to give substantive form to legal analyses. This cautionary approach to fictions must be kept in mind to avoid analytical difficulties, which arise when the use of a fiction is not accompanied by the explicit acknowledgement of its falsity. There must be a clear recognition that the real purpose in copyright law for deeming authorship on someone other than the creator is to consolidate ownership of copyright into a single entity.¹⁶⁹ The fiction becomes troublesome when society forgets this reason and sees the fiction as truly divesting the real author of his or her rights. This will have the effect of obscuring

sonal process. In many cases, the author creates because of a desire to express her own observations about the world around her.”).

166. An example of the true creator of the work being disenfranchised is when he is deprived of moral rights protection. In *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 87–88 (2d Cir. 1995), the court denied injunctive relief to three professional sculptors who sought to prevent the modification or destruction of their walk-through sculpture located in the building lobby of the defendants, who owned the building that contained the sculpture. The court held that since the artists were employed by the previous building owner to design, create, and install the sculptures in the building, the sculpture was a work-for-hire. As the moral right to prevent the destruction of a creative work is only provided to works of visual art under the Visual Arts Rights Act of 1990, and as Section 101 excludes a work for hire from the definition of a “work of visual art,” the court denied the sculptors relief. *See* 17 U.S.C. § 106(a)(1)(B) (2012). *See also infra* note 170 for a discussion of employer-employee relationship and the work-for-hire doctrine in this case.

167. *See generally* FULLER, *supra* note 2.

168. *See generally* VAIHINGER, *supra* note 10.

169. For a detailed description of this rationale for the work-for-hire doctrine, see United States Copyright Office and Sound Recordings as Work Made for Hire, *supra* note 15 at 141 (“The economic rationale for the 1976 Copyright Act’s work for hire provisions is rooted in the well-documented problem of transaction costs. . . . By allowing the parties to definitively confer for-hire status on these works, [the Act] promotes marketability by making it possible for parties to eliminate an otherwise chaotic state of copyright title, centering full ownership in a single individual or entity and thus facilitating the secure and fluent transfer of ownership interests over the life of the copyright.”).

the person of the author, alienating authorship, and devaluing the requirement of originality as the cornerstone of the copyright system. Each of these consequences is discussed in turn.

A. *The Mystification of the Author*

Deemed authorship and the work-for-hire doctrine obscure and mystify an already nebulous idea of the author. Since authorship has never been explicitly defined in international or national copyright laws, it is vital that deemed authorship be used carefully to avoid the mistaken belief that individual human producers of creative works can easily have their rights divested by the law or that the creative contributions of these individual creators are not significant to the progress of science. When the law designates an employer or commissioner as the author, especially when the law does not require the employer or commissioner to make any form of creative contribution to the work,¹⁷⁰ the question of who is the actual creator of a work is bound to lose significance.¹⁷¹

170. The Supreme Court has held that the hiring party need only have a “right to control the manner and means by which the product is accomplished,” as is defined in the general common law of agency, for a hired party to be considered an employee. *Comty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989). If an employer has the right to control how the work is produced and its employee produces a work during the course of his or her employment, the work will be considered a work-for-hire and the employer will be considered the author of that work. Some factors that the Court thought were relevant to the inquiry of whether an employment relationship existed between the hiring and hired parties include: the level of skill required of the hired party to produce the work; the source of the hired party’s instrumentalities and tools; where the work was located; the length of the relationship between the hiring and hired parties; whether the hiring party has the right to assign additional projects to the hired party; how much discretion the hired party had over when and how long to work; how the hired party was paid; whether the hired party had a role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is running a business; whether the hiring party provides employee benefits to the hired party; and the tax treatment of the hired party. *Id.* at 751–52. The *Reid* test was applied by the Second Circuit in *Carter*, *supra* note 166, in which the court decided that the sculptors were employees even though they had “full authority in design, color and style,” and the employer only retained the “authority to direct the location and installation of the artwork within the building.” *Carter*, 71 F.3d at 80. The court seemed swayed by the other factors in the *Reid* test: the employers had also assigned additional projects to the sculptors and had “paid payroll and social security taxes, provided employee benefits such as life, health, and liability insurance and paid vacations, and contributed to unemployment insurance and workers’ compensation funds on plaintiffs’ behalf.” *Id.* at 86–87.

171. *See, e.g.*, *Fifty-Six Hope Rd. Music v. UMG Recordings, Inc.*, No. 08 CIV. 6143(DLC), 2010 WL 3564258 (S.D.N.Y. Sept. 10, 2010). This case involved the ownership of the renewal term of copyrights in certain sound recordings created by singer-song writer Bob Marley before Jan. 1, 1978. UMG’s successors-in-interest entered into a series of exclusive recording agreements with Marley, where Marley

It certainly does not help that academic literature has neither bolstered nor augmented this scant image of the author in copyright law. Some prominent scholars have promoted the idea that the author is barely more than a socially constructed metaphor developed to convince the public that creative works are a valuable market commodity. For example, in *The Author, Art, and The Market*, Professor Martha Woodmansee asserts that the author as original creator only emerged when professional writers, seeking to earn their livelihood by writing for a burgeoning literary market in the Eighteenth Century, tried to redefine their roles in the production of literary works.¹⁷² According to Woodmansee, the repackaging of the writer as an author conjured up the image of an original and inspired genius; because an author's inspiration emanated from within, his work was distinctly his product and thus his property.¹⁷³ He was no longer a mere craftsman or writer. The ideas of the "author" and the "original genius" allowed writers to justify earning their living through the commodification and commercialization of literary works. These ideas also convinced the reading public of the intrinsic value of the author's work.¹⁷⁴ Thus, in this spirit, when *Lyrical Ballads* was first received unfavorably by the public, Wordsworth quipped that any work of original genius including his own had the task of enlightening its readers by "widening the sphere of human sensibility, for the delight, honor, and benefit of human nature."¹⁷⁵

Scholars who have studied copyright history in England and the United States have made analogous claims. In *Copyright in Historical Perspective*, Lyman Ray Patterson documented the history behind the Statute of Anne—the world's first law expressly recognizing authors as owners of their works, giving authors separate and independent

would be paid certain advances against his royalties for the creation of the sound recordings. The recording company registered itself as the author of sound recordings when it registered the recordings with the Copyright Office. After Marley's death and when the copyright in the recordings came up for renewal, his widow Rita sought a declaratory judgment that they were the owners of the renewal term for copyright in the sound recordings pursuant to Section 24 of the Copyright Act of 1909. Cote, J., held that the sound recordings were works-for-hire, which made UMG the "statutory author," even if in the "common dictionary sense" Marley was the "creator or source of the Sound Recordings." *Id.* at *7. She goes on to say, "[t]he fact that Marley may have exercised artistic control over the recording process . . . is legally irrelevant; what is dispositive is that [the recording company] had the contractual right to accept, reject, modify, and otherwise control the creation of the Sound Recording." *Id.* at *10.

172. MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 36 (1996).

173. *Id.* at 37.

174. *Id.*

175. *Id.* at 39.

copyrights of their own.¹⁷⁶ The law gave authors the exclusive right and liberty to print their works for 21 years, whereas previously only members of the Stationer's Company—which was comprised of stationers, booksellers, and printers of books—had the right to print.¹⁷⁷ The significance of the Statute of Anne was that authors, who were never recognized as having exclusive rights to print their own works, were suddenly vested with ownership of their books and protected against unauthorized printings of their work.

Despite this statute, Patterson appears to downplay the importance of legislative recognition of the role of the author in encouraging learning.¹⁷⁸ Patterson instead argues that the Statute of Anne was never intended to benefit authors; rather, he argues that it was a trade regulation to manage the book industry.¹⁷⁹ Even with express statutory language protecting the author, Patterson and other copyright scholars have argued that the Statute of Anne did not provide credence to the author as an individual with rights in his creation.¹⁸⁰ Rather, they tend

176. The Statute of Anne, 1710, 8 Ann. c. 19 states:

Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families: for preventing therefore such practices for the future, and for the encouragement of learned men to compose and write useful books . . . the *author* of any book or books printed . . . or bookseller . . . printer . . . or other person who hath purchased or acquired the copy or copies of any book or books in order to print or reprint [them], shall have the sole right and liberty of printing such book and books for the term of one and twenty years.

(emphasis added).

177. The Crown's interest in censorship of the printing press led to the passing of several Licensing Acts that allowed the Crown to monitor prints through the Stationer's Company, and which gave the Stationer's Company the exclusive right to print books and pamphlets. LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 143 (1968).

178. The preamble to the Statute of Anne calls it an "act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." Statute of Anne, c. 19.

179. PATTERSON, *supra* note 177, at 143.

180. Augustine Birrell thought that the Statute of Anne, by including the author as a copyright holder under statute, destroyed any common-law recognition of authors' rights by the courts. He states that "there was a steady majority of judges in favour of the view that but for the Statute of Anne, an author was entitled to perpetual copyright in his published work." AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 21–22 (1899). Benjamin Kaplan viewed the inclusion of the author into the Statute as a tactical move by publishers to put forward authors' interests together with their own. See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 8 (1966).

to view the inclusion of the author into the Statute of Anne as an ill-considered act of legislative intervention in response to intense public dissatisfaction with the operations of the book trade. Patterson claims the monopolies in the book trade were so entrenched that the only way to break them up was to introduce the author as an independent right holder into the Statute of Anne. In this way, “the author was used primarily as a weapon against monopoly.”¹⁸¹

English scholar Mark Rose tells a slightly different story in *Authors and Owners: The Invention of Copyright*. Rose observes a number of influential writers, such as Locke, Defoe and Addison, making claims to authorial rights in their works and gaining parliamentary prominence before the Statute of Anne.¹⁸² But Rose acknowledges that even while the drafters of the Statute of Anne were “sympathetic” to these claims, “the legislature drew back from making any statement about authors having an ‘undoubted property’ in their writings.”¹⁸³ As it is unclear if Parliament included authors in the Statute of Anne to implicitly recognize a fundamental authorial right or to grant them newly recognized legal rights in their work,¹⁸⁴ history is no more instructive in providing shape to the notion of the author.

Other scholars have argued that the author is a mere “ideologically charged concept”¹⁸⁵ used in copyright law to mediate the “tension between access and ownership” that arises through the use of creative works or to support the economic stakes that “copyright proprietors” have in the distribution of the work as “commodities.”¹⁸⁶ The concept of authorship provided these copyright proprietors some justification for ownership and the right to exclusively control their works.¹⁸⁷

Meanwhile, a number of literary critics have advanced the postmodern view that the author is a socially constructed metaphor

181. PATTERSON, *supra* note 177, at 147.

182. ROSE, *supra* note 133, at 32–48 (1993).

183. *Id.* at 48.

184. *Id.*

185. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of ‘Authorship’*, 1991 DUKE L.J. 455, 456.

186. *Id.* at 500–01.

187. Proponents of a perpetual copyright after the Statute of Anne, particularly booksellers who were used to having perpetual rights until the statute reduced the term to 21 years, relied on the author’s common-law right to argue that it was an underlying right that was supplemented, rather than created, by statute. See PATTERSON, *supra* note 177, at 152–79; ROSE, *supra* note 133, at 67–91. Compare *Millar v. Taylor*, 98 Eng. Rep. 203 (K.B. 1769) (featuring a bookseller relying on the author’s right to claim perpetual copyright outside the Statute of Anne) with *Donaldson v. Beckett*, 1 Eng. Rep. 837 (H.L. 1774) (presenting a similar case, except the bookseller’s claim was unsuccessful).

that supports individualism, the privatization of creative production, and the commercialization of literary and artistic works,¹⁸⁸ making the notion of the author even more ambiguous in copyright law. To Roland Barthes, the author is also a product of society: the author, who “is always conceived of as the past of his own book,” is in “the same relation of antecedence to his work as a father to his child.”¹⁸⁹ But Barthes urges the literary critic to discard the view of the author as the person from whom the work originated, arguing that a written work can only be properly understood when it comes together for the reader and not when it originates from an author.¹⁹⁰ Hence, Barthes argues that “the birth of the reader must be at the cost of the death of the Author.”¹⁹¹ Michel Foucault also believed the person of the author to be irrelevant to literary criticism, noting that “the author has disappeared.”¹⁹² Instead of individualizing the author and linking him with

188. See generally Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1378 (2005) (borrowing from Foucault and Barthes to argue that the author’s chosen identity serves as a trademark to prevent consumer confusion); Lior Zemer, *The Copyright Moment*, 43 SAN DIEGO L. REV. 247 (2006) (using scholarship on authorial constructionism to argue that copyright law should protect all actors in the creative process); Lionel Bently, R. v. The Author: *From Death Penalty to Community Service*, 32 COLUM. J.L. & ARTS 1, 15–16 (2008) (arguing that the works of Woodmansee, Rose, and others led some “to argue that it is the mythical figure of the romantic author that has driven copyright expansion”); Olufunmilayo B. Arewa, *The Freedom to Copy: Copyright, Creation, and Context*, 41 U.C. DAVIS L. REV. 477, 506 (2007) (arguing that current copyright laws are unable to accommodate the practices of borrowing, copying and reuse of creative materials in the act of creativity because of “views of cultural production that derive from Romantic author conceptions”); Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207, 208 (2007) (referring to the works of Foucault, Woodmansee, and Rose to argue that copyright law’s emphasis on the author obscures the “communicative function of authorship”); ROSEMARY COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES 284 (1998) (“Rather than the Romantic expression of an author—the literary work that embodies his unique personality—the (post)modern text ‘has no other origin than language itself.’” (quoting Roland Barthes, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142, 146 (Stephen Heath trans., 1977))). Coombe goes on to argue that the proliferation of information and communication technology has resulted in “a steady expansion of the fields in which authorship and new forms of cultural authority are claimed.” *Id.* at 285.

189. Barthes, *supra* note 188, at 145.

190. *Id.* at 148 (observing that “a text is made of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author. . . . [A] text’s unity lies not in its origins but in its destination.”).

191. *Id.*

192. Michel Foucault, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 113, 121 (Donald F. Bouchard ed., 1977).

his text, Foucault saw the author as a function of discourse.¹⁹³ He states that the author's function is to "characterize the existence, circulation, and operation of certain discourses within a society."¹⁹⁴

By designating the employer or the commissioner of a work as the author through the work-for-hire doctrine, any tangible conception of the author is diminished further. If the author is a mere social construct—as these postmodern theories suggest—the persona of the author carries little significance and need not attach to the actual creator of the work nor to any real or natural person; it may be deemed on any entity the law deems appropriate. A corporation, which has employees working to produce creative works such as movies, software, or music, is not the actual creator of the work. However, by satisfying the right conditions for employment which generates employee creativity, the law treats the employer as the author of the work. It would seem therefore that if the law is able to deem authorship on someone other than the true creator of a work, then the author is indeed nothing more than a social construct in the postmodernist sense.

This is not the correct view of the author. Authors have always been—and remain—the suppliers of creative works that publishers purchase and distribute to the public.¹⁹⁵ Even early publishing contracts vested extensive property rights in the author beyond the publisher's right to print the work. Even before the Statute of Anne was passed to provide authors with legal interest in their work, the 1667 publication contract for *Paradise Lost* between John Milton and publisher Samuel Simmons contained a clause that allowed Milton to "demand an accounting of sales at reasonable intervals."¹⁹⁶ This clause suggests that Milton assumed a property right in the work separate from the publisher's assigned right to print. In essence, the author was treated as the owner of the work and beneficiary of publisher sales; the publisher assumed the role of trustee.¹⁹⁷

193. *Id.* at 121–24.

194. *Id.* at 124.

195. Even as author's rights were not explicitly recognized, publishers still sought authors out and asked them for permission to publish their work. While publishers paid for the right to print and distribute the work, the author still retained rights to control any modifications to the work. Maureen A. O'Rourke, *A Brief History of Author-Publisher Relations and the Outlook for the 21st Century*, 50 J. COPYRIGHT SOC'Y 425, 429–30 (2003); see also Alina Ng, *Literary Property and Copyright*, 10 NW. J. TECH. & INTELL. PROP. 531 (2012) (reviewing historical evidence showing that authors retained rights in their works after publication and distribution rights were assigned to the publisher).

196. Peter Lindenbaum, *Milton's Contract*, 10 CARDOZO ARTS & ENT. L.J. 439, 443 (1992).

197. Ng, *supra* note 195, at 534–35.

Publishers in early American publishing also appeared to recognize the unique role of the author as the supplier and owner of creative works. Consider, for instance, the March 1868 contract between Ralph Waldo Emerson and Ticknor and Fields (which later became Houghton Mifflin Harcourt) for the publication of *May-Day and Other Pieces*. This contract contained a clause granting Emerson the right to control the contents of his manuscript. In particular, the contract required Emerson to provide stereotype plates of the work and authorize the publication of any new editions. The publisher had no other right than the right to print the work. Emerson also had the right to terminate the contract anytime he chose; if he did so, all that was required was that he purchased all remaining copies in Ticknor and Fields' possession at cost. Through these provisions, Ticknor and Fields seemed to acknowledge Emerson's distinct property right in the work beyond the standard rights contained in ordinary contract terms.¹⁹⁸

Furthermore, the author is not always the entrepreneur—sometimes the author is just the creator and author of the work, whose interest in the publication and distribution of authentic expression can easily become subsumed by the economic interest of his employer or publisher/distributor.¹⁹⁹ Professor Roberta Kwall, for example, has argued that the creative act is not always motivated by economic rewards. Creative production can spawn simply from the “desire for challenge, personal satisfaction, or the creation of works with a particular meaning or significance for the author” rather than the “reaping [of] economic reward.”²⁰⁰ Sometimes, human beings create because there is an innate urge to create, not just because a market profit is in the horizon. Case in point: As Kwall points out, children create because they want to.²⁰¹ So too do creators who produce works without the expectation or hope of reward such as the prehistoric man and his cave drawings, an inmate on death row, or prisoners in Nazi death camps.²⁰² “Art made the worlds of these artists more comforting and

198. *Id.* at 535–36.

199. William Cornish, *The Author as Risk-Sharer*, 26 COLUM. J.L. & ARTS 1, 12 (2002) (noting that authors'-rights jurisdictions such as Germany and France do not have copyright laws which are “mere pretexts for protecting the investment and entrepreneurial initiative of authors' exploiting partners” and pointing out that copyright laws “which derive their legal and moral force from the act of creativity” and which protect an author's rights are not the same as producer investment laws, which protect commercial investments in merchandise production).

200. Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1947 (2006).

201. *Id.* at 1949–50.

202. *Id.* at 1950.

tolerable,” Kwall notes.²⁰³ For this reason, the satisfaction that individuals derive from free expression must not be lumped in with the profit-driven interests of employers. The author’s expression should be recognized as his own.

If we fail to recognize that deeming authorship through the work-for-hire doctrine is useful only to circumvent the problem of transaction costs, the important role of the author in launching and supporting “lively cultural expressions” will also be overlooked.²⁰⁴ The author is a unique contributor to cultural and political discourse. He provides a unique perspective to democratic dialogue in civil society and must be allowed to speak in his own voice and identity. He should not be stripped of his identity and forced to hide behind the mask of an employer. As copyright law can be used to promote a civil democratic society as Professor Neil Weinstock Netanel argued,²⁰⁵ creators of expressive works need to be recognized by copyright law for their own authentic voices as authors of their work in civil discourses. The need to hear these voices is even more important in nations transitioning to more democratic forms of government.²⁰⁶ To promote their important democratic function in civic engagement, authors should be given every reasonable opportunity to assume their own identity and speak from a position of empowerment. The work-for-hire doctrine, if used without conscious acknowledgement of its role as a consolidator of different ownership in a work, will obscure the identities of authors as they express themselves in civil society through their creations.

B. *The Alienation of Authorship*

Deeming authorship on an author’s employer or the commissioner of a creative work also raises a fundamental question about whether a creator’s status as author of the work can be alienated. It dubiously suggests that authors can reasonably be expected to contract their status as a work’s creator as easily as one could contract the provision of creative services to another.

203. *Id.*

204. See Cornish, *supra* note 199 (suggesting that author play a large role in literary and artistic creativity).

205. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L.J.* 283, 288 (1996) (“[C]opyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society” by “provid[ing] an incentive for creative expression on a wide array of political, social, and aesthetic issues” and “support[ing] a sector of creative and communicative activity that is relatively free from reliance on state subsidy, elite patronage, and cultural hierarchy.”).

206. See John Mukum Mbaku, *Copyright and Democratization in Africa*, 7 *BYU INT’L L. & MGMT. REV.* 51 (2011) (suggesting that copyright law can be used to help transition Africa to a democratic form of governance).

This proposition is refuted by the Berne Convention. Article 6*bis* of the Berne Convention separates an author's moral rights from his or her economic rights, and provides for the retention of an author's moral rights even after the economic rights have been transferred to someone else.²⁰⁷ Moral rights, unlike economic rights that protect a copyright owner's right to commercialize and make profit from the sale and distribution of the work, protect an author's personal interest in the work such as the right to claim authorship ("paternity" right) or to object to any form of unauthorized modification ("integrity" right). Moral rights also include the rights to withdraw the work from public circulation, publish the work, and prevent other "injuries to the author's personality as embodied in the work."²⁰⁸ The Berne Convention actually treats moral rights protecting identity and integrity as being inalienable of the author even while the rights to reproduce and distribute the work are transferrable and alienable. Some jurisdictions parallel Berne's vision of the author's copyright as twofold, comprised of economic rights to profit from the sale of rights to commercially exploit the work on the market as separable from the more basic authorial rights of integrity and paternity stemming from one's status as the author and creator of the work. These moral rights are still retained by the author even after the economic rights to exploit the work have been transferred to another.²⁰⁹

Berne's approach to the retention of moral rights even after economic rights have been transferred speaks to the normative value of protecting the personality of the author. As the creator of the work, the author has personal prerogative in deciding how the work will be perceived by society.²¹⁰ The separation of economic and moral rights and the retention of moral rights after the transfer of economic rights reveal a normative stance that the author's personality and integrity

207. Berne Convention, *supra* note 151, at 51 art. 6*bis* ("Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.").

208. RALPH C. BROWN & ROBERT C. DENICOLA, COPYRIGHT: UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF AUTHORSHIP 769 (2002).

209. William Strauss, *The Moral Right of the Author*, 4 AM. J. COMP. L. 506, 515 (1955); Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 207-08 (1994-1995); PAUL GOLDSTEIN, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 290-91 (2001) (identifying France and Spain as authors'-rights countries that impose an absolute bar on the transfer of moral rights and Germany, which allows the waiver of moral rights only when it would be unjust not to).

210. Moral rights are concerned essentially with the author's public reputation. GOLDSTEIN, *supra* note 209, at 285.

should not be compromised just because he chooses to exploit the work by assigning away various exclusive rights. If moral rights are intended to protect the author's "freedom, honor, and reputation," these rights—like the rights to life or liberty—should also be inalienable as a matter of moral, ethical, and practical propriety.²¹¹ Some jurisdictions in continental Europe that enforce strong moral rights view the right of an author to control the publication and distribution of his work as a form of civil liberty,²¹² thereby protecting an author's personality in the way his life or freedom is protected.²¹³ In this light, it seems fair to wonder if the creator's status as author of a work can be alienated from his person and deemed on another.

Authorship can be viewed as among the individual rights or interests that cannot be alienated. Calebresi and Melamed's well-known categorization of rules regulating and protecting entitlements into property, liability, and inalienable rules carves out a category of entitlements that may be justifiably forbidden from market transfer, such as when a transfer could produce significant costs to third parties or when a transfer may amount to an affront to social morality.²¹⁴ Being an "author" of a creative work is central to one's identity—an integral part of who someone is—that is inseparable from a person. The word "author" is more than a label the law puts on a designated entity; the word "author" is so constitutive of who a person is—such as "mother," "husband," "man," or "woman" are constitutive of one's identity as a person—that alienating that identity and putting it on another makes one a less complete person.²¹⁵

The separation of two doctrinally distinct rights of an author in Article 6*bis* of Berne may reflect an unspoken but general belief that the personal rights of an author support his human flourishing on a

211. Strauss, *supra* note 209, at 515. Note, however, that many authors'-rights jurisdictions allow moral rights to be expressly waived by the author even though the law may state that they are inalienable, and thus, non-transferrable. See GOLDSTEIN, *supra* note 209, at 291–92.

212. Civil-law jurisdictions with strong moral rights in continental Europe such as France, Germany, and Italy have "sturdier roots in the author's right tradition than in the copyright tradition." GOLDSTEIN, *supra* note 210, at 10.

213. Andreas Rahmatian, *Non-Assignability of Authors' Rights in Austria and Germany and its Relation to the Concept of Creativity in Civil Law Jurisdictions Generally: A Comparison with U.K. Copyright Law*, 5 ENT. L. REV. 95, 97 (2000).

214. Guido Calebresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111–15 (1972).

215. Thus a person's character, moral beliefs, and personal experiences cannot be extracted from one's personality, commodified, and sold in the market. To think that "the 'same' person remains when her moral commitments are subtracted . . . is to do violence to our deepest understanding of what it is to be human." Radin, *supra* note 14, at 1906.

fundamental level and should not be detached from his person for the sake of easing the commercialization of creative work.²¹⁶ By deeming authorship on someone other than the author without the realization and express acknowledgement that the reason for doing so is to concentrate *ownership* rights to facilitate the licensing of creative works, copyright law may have made the mistake of concluding that a person's identity as an author can be alienated without engaging in the more fundamental inquiry of whether it should be alienable.

C. *The Diminishment of Copyright's Sine Qua Non*

The doctrine of deemed authorship obscures the normative value of the requirement of originality in the law and renders moot the Supreme Court's proclamation that "the *sine qua non* of copyright is originality."²¹⁷ Copyright law requires works to be original so that first-ownership rights and exclusive rights to exploit the work can be firmly established through copyright.²¹⁸ While the law has modest expectations for the level of creativity that the author should put into producing the work,²¹⁹ and certainly does not require the author to match the "etchings of Goya or the paintings of Manet,"²²⁰ originality still sets an appropriate benchmark for when property rights may be first recognized in intellectual creations that are vulnerable to free-riding upon distribution. The rule that a work must be original to an author to be eligible for copyright protection also serves a practical authentication function in the copyright market. By emphasizing the relationship between author (as the person to whom the work owes its origin) and the work (as the product of the author's creativity) and denying copyright protection to works that are unoriginal or mere copies of another work, the law is able to manage the circulation of original and counterfeit, forged, or unauthentic works in the market and

216. For this reason, author's-rights jurisdictions protect the author of works that are able to bear the personality of the author such as intellectual works in the areas of literature, music, the fine arts, and film. See Rahmatian, *supra* note 213, at 97.

217. *Feist*, 499 U.S. at 345.

218. *Burrow-Giles*, 111 U.S. at 58–59 (The Supreme Court observed that some intellectual creations such as engravings, paintings, and printings "embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author.").

219. *Feist*, 499 U.S. at 345 ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark 'no matter how crude, humble or obvious' it might be. Originality does not satisfy novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying.").

220. *Bleistein*, 188 U.S. at 251.

provide the public with a legal criterion to authenticate the work, recognize its worth, and attach the appropriate market value to it.²²¹

The low standard for originality effectively allows a producer of essentially similar works to obtain their own copyright when there is a variation—however slight—in the final product.²²² Some copiers may therefore be able to obtain new copyrights for themselves by simply making minor, even inadvertent, changes to their copy.²²³ Other copiers may copy originals and have reputations so acclaimed they command significantly high prices for their replicas because of their name alone.²²⁴ Furthermore, the idea that authors are original creators has also come under attack by literary scholars who have argued that creators of literary works are seldom original; authors and poets imitate nature and other literary works all the time.²²⁵ As most literary and artistic works are an imitation of things surrounding their creator, the “creative” poet who sits down with a pencil and some blank paper and eventually produces a new poem in a special act of creation *ex nihilo* just does not exist; “[h]uman beings do not create in that way,” Northrop Frye says.²²⁶ Copyright scholars have made a similar argument about literary and artistic production.²²⁷ As creators are seldom origi-

221. See Deborah M. Hussey, *The Sine Qua Non of Copyright*, 51 J. COPYRIGHT SOC'Y U.S.A. 763, 786–89 (2003–2004) (stating, for example, that authentic Rodin sculptures that are cast under Rodin's authority or the authority of his heir, the Musée Rodin, are valued more in the international art market. In 1999, an authentic Rodin Eve sculpture whose provenance can be verified was sold for \$4.8 million at Christie's New York but the same piece without a similar provenance may have only fetched \$500,000. Bronzes made closer to the artist's lifetime are also worth more on the art market).

222. See *Alfred Bell v. Catalda Fine Arts*, 191 F.2d 99, 105 (2d Cir. 1951).

223. See *id.*

224. Hussey, *supra* note 221, at 790 (noting the high price the Rockefeller Collection commands for exact replicas of Rodin pieces because of the “aura, or at least the spell, of Rockefeller's personality.”).

225. NORTHROP FRYE, *ANATOMY OF CRITICISM* 95–96 (1990) (“[A]ny poem may be examined, not only as an imitation of nature, but as an imitation of other poems.”).

226. Frye thus wrote to dispel the conception of the romantic author who produced works *ex nihilo*; the idea that one could create a work without drawing from sources around him was unacceptable. Just as discoveries in science attest to things that were already “latent in the order of nature,” poems attest to things that were already “latent in the order of words.” *Id.* at 97.

227. See, e.g., Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of 'Authorship'*, 2004 BYU L. REV. 69, 71; Wendy Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1556 (1993); Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965, 966 (1990); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 333 (1989).

nal, these scholars argue, copyright's insistence on originality as the benchmark for allocating first ownership rights may be misplaced.²²⁸

Deeming authorship on someone other than the true creator of the work further diminishes the value of originality in the copyright system, as the law sends a public message that the provenance of a work is irrelevant in how first ownership rights are allocated. The reality of the market for literary and artistic works is that a work's provenance—the identity of its true creator—often matters to the purchasing public, who may be willing to pay a much higher price for a work that is original to a particular author or artist. For instance, an authentic Rothko painting is capable of fetching \$8.3 million, while the liability art galleries face for selling forgeries to art collectors have involved millions of dollars.²²⁹ Likewise, the value of certain artwork has been known to increase over 200 times after its pedigree has been authenticated.²³⁰ The origins of a work and its connection to its human creator are sometimes a significant determinant of a work's commercial value. By deeming authorship on someone other than the true creator, the law undermines its requirement that works be original for copyright protection by letting non-authors represent themselves to be the originator of a work, thereby thwarting expressed public preferences and value for original and authentic works.

Implicit in the law's requirement of originality is that the work be authentic to its creator; in other words, that it *really and truly* proceeds from its identified authorial or artistic source.²³¹ This implicit meaning of originality does not fault authors for borrowing or imitating others, but rather underscores that what is more important for the requirement of originality is the practical realization that the work be

228. See generally Gideon Parchomovsky & Alex Stein, *Originality*, 95 VA. L. REV. 1505 (2009) (proposing that an author's level of protection in copyright law be calibrated to the level of originality in his works); Ryan Litterell, *Toward A Stricter Originality Standard for Copyright Law*, 43 B.C. L. REV. 193 (2002) (calling for a stricter standard of originality to maintain a robust public domain for future creativity); Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801 (1993) (proposing principles to analyze whether a work is original).

229. Patricia Cohen, *2nd Suit Accuses Gallery of Selling Fake Art*, N.Y. TIMES, Mar. 28, 2012, http://www.nytimes.com/2012/03/29/nyregion/knoedler-gallery-is-accused-of-selling-fake-rothko-painting.html?_r=0 (describing a \$25 million lawsuit against the art gallery Knoedler & Company for selling a fake Rothko painting).

230. See Douglas Birch, *\$40 Sketch Could Be a \$9,000 Utrillo: Did Baltimorean Hit the Jackpot?*, BALT. SUN, July 27, 1992, http://articles.baltimoresun.com/1992-07-27/news/1992209059_1_pencil-sketch-utrillo-salinger (describing how a painting bought for \$40 was valued at between \$7,000 and \$9,000 once a drawing specialist declared it to be an authentic sketch of the French artist Maurice Utrillo).

231. Hussey, *supra* note 221, at 770 (defining originality as "proceeding *immediately* from its source" and authenticity as "*really* proceeding from its source").

authentically the author's.²³² The work-for-hire doctrine has the potential to obscure a reality that the law's requirement of originality not only allocates first ownership rights through an appropriate benchmark; originality also allows the law to conform to social expectations that authentic works would be more valuable on the market. Without the realization that some legal fictions may be necessary to ease the application of the law, this reality that authenticated works are commercially more valuable on the market may be concealed by the fiction that a work's provenance and true origins can be set aside for the entity deemed into the place of the true creator.

CONCLUSION

The creator of literary and artistic works is the ethical foundation of the copyright system. As individuals, authors and artists make the most important contributions to the global repository of human knowledge. Our culture is a product of human activity and developed by human effort.²³³ So too is our experience of the world. Human creators contribute to that experience. The copyright system must protect the human creator in his unique role in advancing society, art, and culture. The copyright system may then effectively promote the progress of science through the authentic writings of authors.

The irony of copyright law is that, without even realizing it, it sometimes devalues the very individual who is capable of making the most significant contributions towards its institutional aim. Through the concept of deemed authorship, the law mystifies the person of the author, alienates his identity, and diminishes his importance as the person from whom the work originates. The law has yet to recognize that each creator has a personal connection with their creations that can be used to authenticate works in public circulation and encourage more authentic forms of authorship, which may then support the advancement of knowledge and the progress of science over a prolonged period.

A more specific definition of originality may be timely in the United States to avoid the confusion that deemed authors are considered true authors in the eyes of the law even when the work originated

232. Frye acknowledges that a poet may not be original, but the value of his or her work lies not in what he added on to his source but rather in what the poet passes on to his readers. Thus Milton's "Paradise Regained" as a poem may not have been original in that much of its prose was borrowed from the Bible. But it was definitely authentic to Milton, who passed on his own rhetoric to his readers. FRYE, *supra* note 225, at 95.

233. See generally ELIE MAYNARD ADAMS, *THE METAPHYSICS OF SELF AND WORLD: TOWARD A HUMANISTIC PHILOSOPHY* 253 (1991).

from an employee or a commissioned author or artist. We may want to look toward the European Union, where a work is considered original only if it is “the author’s own intellectual creation.”²³⁴ In contrast, the U.S. definition of originality allows employers and commissioners of works to step into the shoes of the author and hold themselves out as the true creator of the work because the work *originated* from them even if they did not create the work.²³⁵ The European definition of originality would allow employers and commissioners to be owners of copyright acquired from the true author and not “authors” possessing initial ownership rights in the work because they by definition did not create the work with their own intellect.

Despite these concerns, allocating first ownership with the employer or commissioner has its utility. Legal fictions—at least the good ones that facilitate understanding about the law and its function—are sometimes indispensable to legal thinking. The work-for-hire doctrine and the concept of deemed authorship may be useful if they are applied with consciousness of their purpose: to combat prohibitively high transaction costs which could prevent the transfer of rights in creative works.²³⁶ Whether legal fictions are beneficial or harmful ultimately depend on whether they serve as support structures that make the language of the law more logical and accessible or as blindfolds that deprive the scholar, the practitioner, and the public from truly understanding the law and what it stands—or should rightfully stand—for. The problems that come with the use of legal fictions are real, and one must always recognize that the fiction is a deviation from reality, even when many of us are so quick to attribute objective truth to that fiction, a mere intellectual construct that allows thought to “manipulate and elaborate what is given.”²³⁷ The “formal processes of thought” and the “objective reality of external events” are not the same thing.²³⁸ Forgetting that legal fictions are false pretenses will cause problems to arise when we think that these fictions are real and forget that they are actually “the creations of our own minds.”²³⁹

234. *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 ECR I-6569, ¶¶37–39 (E.C.J.).

235. Under Supreme Court doctrine, a work is original if its components “are original to the author,” which protects a wide variety of works as long as they originate from an “author” even if that “author” did not create the work intellectually. *See Feist*, 499 U.S. at 348.

236. *See generally* Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982) (discussing how transaction costs affect market transfers).

237. VAHINGER, *supra* note 10, at 35.

238. *Id.*

239. FULLER, *supra* note 2, at 136.

Not all legal fictions are indispensable. These conceits of our legal imagination are only indispensable when they act as a stepping stone towards a value that the law cannot easily attain, such as justice, fairness, and due process. Sometimes, we need to rely on a metaphor to help connect what we hope to achieve through the law with familiar experiences. These fictions are necessary and indispensable because there are no available alternatives to achieve the morally correct decision through law. When we admit that our assumptions are false, the presence of the artifice becomes obvious and the truth about the issue is revealed. Laws may then develop as necessary to match social expectations and fundamental reality.²⁴⁰ With deemed authorship, the legal fiction may be necessary. But it is important to recognize that the doctrine of deemed authorship consolidates first ownership rights, as this will reveal the doctrine as a legal fiction that functions only as a bridge to make the law functional. The fiction must not be used to a point where the greater need to understand who the author is, the role he plays, and the meaning of authorship in the copyright system is obscured. As long as the fiction of the deemed author is used with caution, there should be no fear of the danger Fuller warned of.

240. More rules consistent with donative intent, for example, developed to limit or avoid the Rule Against Perpetuities and to effectuate the true intent of the donor despite the invalidating fictions of lifetime fertility. Some states have relaxed the constraints of the rule for perpetual trusts to allow donors of gift to asset some control over the future. See Robert H. Sitkoff and Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 *YALE L.J.* 356 (2005). See also Leach, *supra* note 32, at 730 (advocating a wait-and-see approach before invalidating a gift).